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RECORD NO. 06-4494

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

UNDER SEAL
TOP SECRET
CODEWORD

v.

ZACARIAS MOUSSAOUI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA

THE HONORABLE LEONIE M. BRINKEMA, PRESIDING

BRIEF OF APPELLANT

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– "The very word 'secrecy' is repugnant in a free and open society, and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. . . . Even today, there is little value in opposing the threat of a closed society by imitating its arbitrary restrictions. Even today, there is little value in insuring the survival of our nation if our traditions do not survive with it."

> President John F. Kennedy, Address before the American Newspaper Publishers Association: The President and the Press (April 27, 1961).

– "Sir Hugh, persuade me not – I will make a Star-chamber matter of it."

> William Shakespeare, The Merry Wives of Windsor, act 1, sc. 1, lines 1-2 at 338 (The Complete Pelican Shakespeare, rev. ed. 1969).

Zacarias Moussaoui is an admitted member of al Qaeda. In August 2001, Moussaoui was in Minnesota taking flight lessons on a 747 flight simulator when he was detained by the Immigration and Naturalization Service (INS) and the Federal Bureau of Investigation for overstaying his visa. On September 11, 2001, Moussaoui was in jail awaiting deportation to France. After the September 11th attacks, the White House named Moussaoui the so-called "20th hijacker," and the worldwide press essentially convicted him of direct involvement in those attacks.

Ultimately, Moussaoui pled guilty prior to trial. A year later, a jury – faced with a choice between sentencing Moussaoui to life imprisonment or the death penalty – did not impose death. This raises an obvious question: Having pled guilty and having received the lesser of the two sentences presented to the sentencing jury, what, exactly, does Moussaoui have to appeal?

Moussaoui appeals because his plea was involuntary, unknowing, uncounselled, and invalid under the federal rules. Before he pled, the district court entered a number of patently unconstitutional rulings that deprived Moussaoui of

core Fifth and Sixth Amendment rights. Moussaoui appeals because, for instance, on the incomplete information he had been shown and permitted to discuss with his lawyers, he believed he had no choice other than to plead guilty. He also appeals because the jury found him death eligible in violation of the Federal Death Penalty Act and the Eighth Amendment, and this incorrect finding dictated the sentence he received.

This appeal thus puts in stark relief the guarantee that every defendant in an Article III criminal case is to be afforded the same protections guaranteed under the Constitution. To affirm this judgment, this Court would have to uphold, among other things, ***each*** of the following:

- A district court may bar a criminal defendant from hiring a lawyer not approved by the Government;
- A district court may prohibit a criminal defendant from personally reviewing evidence the court finds to be material and exculpatory;
- A district court may restrict a criminal defendant from discussing with his own lawyer evidence the court finds to be discoverable, and/or material and exculpatory;
- A district court may exclude a criminal defendant from hearings relating to the admissibility of trial evidence;
- A guilty plea may be valid even where the defendant's lawyer was not permitted to explain to his or her client ***why*** the lawyer was recommending against pleading;

- A guilty plea may be valid even when the defendant is confused about the charges to which he is pleading;
- A guilty plea is valid even where a district court fails to hold a competency hearing in the face of evidence requiring one.

As we explain below, there is a Congressionally approved process that would have avoided each of the constitutional errors in this case. Moussaoui thus requests only to have the benefit of protections afforded other defendants in Article III courts.

Of course, some are sure to claim that this is a "special case," one in which we should be willing to negotiate some core rights in exchange for more security. On the contrary, the limitations on the individual rights involved in this appeal are sure to be applied elsewhere – first perhaps against a domestic "terrorist" organization, then perhaps in a case involving a "special" crime, and finally, perhaps against everyone.

In short, this Court should vacate Moussaoui's plea and sentence, and remand for proceedings with fair process.

JURISDICTIONAL STATEMENT

The Second Superseding Indictment ("Indictment")[1] charged Zacarias Moussaoui with six counts: (1) conspiracy to commit acts of terrorism transcending national boundaries (18 U.S.C. §§ 2332b(a)(2) and (c)); (2) conspiracy to commit aircraft piracy (49 U.S.C. §§ 46502(a)(1)(A) and (a)(2)(B)); (3) conspiracy to destroy aircraft (18 U.S.C. §§ 32(a)(7) and (34)); (4) conspiracy

[1] Each of the indictments charged Moussaoui with violating the same statutes.

to use weapons of mass destruction (18 U.S.C. § 2332a(a)); (5) conspiracy to murder United States employees (18 U.S.C. §§ 1114 and 1117); and (6) conspiracy to destroy property, 18 U.S.C. §§ 844 (f), (i) and (n)). JA7-38, JA803.[2] The district court had jurisdiction over the case pursuant to those statutes, and it entered judgment on May 4, 2006. JA5614-19.

On May 8, 2006, Moussaoui filed a motion to withdraw his guilty plea, JA5620-25, and the court denied the motion the same day. JA5626-27.

On May 12, 2006, Moussaoui timely filed a notice of appeal with respect to both the final judgment and sentence and the denial of his motion to withdraw his guilty plea. JA5628-29. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

Was Moussaoui's plea involuntary because the district court violated his Fifth and Sixth Amendment rights by failing to afford him a reasonable opportunity to retain his own lawyer for over five months after indictment?

Was Moussaoui's plea involuntary because the district court deprived Moussaoui of his Sixth Amendment right to choose counsel by requiring retained counsel to undergo a national security background investigation and to be approved by the Government?

Was Moussaoui's plea involuntary because the district court violated Moussaoui's Sixth Amendment right to effective representation by restricting

[2] Cites to "JA__" refer to the Public, Sealed, and *Ex Parte* Sealed Joint Appendices. Cites to "CJA__" refer to the Classified and *Ex Parte* Classified Joint Appendices. Cites to "SJA__" refer to the Supplemental Joint Appendix.

Moussaoui's lawyers from sharing or discussing discovery, including material, exculpatory information, with Moussaoui?

Was Moussaoui's plea involuntary because the district court deprived Moussaoui of his Sixth Amendment right to effective self-representation?

Was Moussaoui's plea involuntary because the district court denied Moussaoui his Sixth Amendment right to attend and participate in critical stages of the proceedings?

Was Moussaoui's plea involuntary because the district court deprived Moussaoui from personally receiving material, exculpatory information in violation of the Fifth Amendment?

Do the Government's recent disclosures about the existence and destruction of tapes containing interrogations of [redacted] Abu Zubaydah require a remand to ascertain the effect on the knowing and voluntary nature of Moussaoui's plea?

Was Moussaoui's plea involuntary because the pervasive deprivation of Moussaoui's Fifth and Sixth Amendment rights – each of which was a structural defect under established Supreme Court law – forced Moussaoui to choose between (1) a fundamentally unfair and uncounselled trial and (2) pleading guilty?

Was Moussaoui's plea unknowing because the district court denied him personal access to material, exculpatory information otherwise available to his lawyers?

Was Moussaoui's plea uncounselled because Moussaoui's lawyers – who each recommended against entering a plea – were barred by district court orders from explaining to Moussaoui the basis for their recommendation?

Was Moussaoui's plea invalid because the process preceding the plea, including the Rule 11 colloquy, improperly led him to believe he was pleading guilty to a conspiracy different than the one in the Indictment?

Was Moussaoui's plea invalid because there was no factual basis that Moussaoui was involved in the September 11th attacks?

Was Moussaoui's plea invalid because there was no basis for venue in the Eastern District of Virginia?

Was Moussaoui's plea invalid because the district court never held a competency hearing and, without doing so, it could not have had a factual basis to find the plea knowing and voluntary?

Was Moussaoui's plea unknowing because he was misinformed about the range of sentences he faced?

Should this Court vacate the finding of death eligibility because there was insufficient evidence for the jury to find that Moussaoui's lies "directly resulted" in a single death in the September 11th attacks?

Was the Federal Death Penalty Act unconstitutional as applied to this case?

If this Court holds that Moussaoui should never have been found death eligible, should this Court remand for re-sentencing?

STATEMENT OF THE CASE

After raising suspicions while training on a flight simulator near Minneapolis, Minnesota, Zacarias Moussaoui was arrested on August 16, 2001, for overstaying his visa. JA2332-33. The FBI interrogated Moussaoui on August 16 and 17, 2001, before Moussaoui invoked his right to counsel on August 17. JA2355; JA2383-84; JA2411. Moussaoui was then held pending deportation proceedings. JA43-51.

Moussaoui was transferred to the Southern District of New York on September 14, 2001. JA2476. On December 11, 2001, a grand jury in the Eastern District of Virginia indicted Moussaoui on the six counts referenced above. JA7-38. Moussaoui had his initial appearance before the Southern District of New

York on December 13, 2001. JA46. That court ordered that Moussaoui be transferred to the Eastern District of Virginia. JA50-51.

At his arraignment on January 2, 2002, Moussaoui informed the district court that he wished to enter "no plea." JA55. The district court interpreted this as a plea of "not guilty" and entered it on Moussaoui's behalf. JA55. The grand jury ultimately issued two superseding indictments against Moussaoui – on June 19, 2002, JA576-605, and July 16, 2002, JA803-32, respectively.

The Indictment[3] accused Moussaoui of traveling to the United States to participate in an al Qaeda conspiracy to attack this country. JA808-09. The gravamen of the Indictment was that Moussaoui was to be a hijacker in the September 11th attacks, but it also included some broader allegations. *See generally* JA803-32. The Indictment alleged that, among other things, Moussaoui acted in furtherance of the conspiracy by lying to investigators in August 2001, thereby preventing the Government from discovering and stopping the September 11th attacks. JA820, 831. At his arraignment on the Indictment, Moussaoui again attempted to enter a "pure plea" or "affirmative plea," JA840, and the district court entered a plea of "not guilty" on his behalf. JA842.

A number of significant rulings took place before trial. Among other things: (1) the Government, with the endorsement of the district court (The Honorable Leonie J. Brinkema) imposed "Special Administrative Measures" upon Moussaoui that effectively isolated him from the outside world and effectively precluded him

[3] "Indictment" refers to the second superseding indictment.

from obtaining legal advice he trusted, JA150-65; (2) the Government and district court failed to afford Moussaoui the opportunity to retain his own counsel until nearly eight months after his arrest and five months after indictment, JA217-79; (3) the district court limited Moussaoui's choice of counsel to attorneys top-secret-cleared by the Government, JA246; (4) the district court permitted the Government to produce material, exculpatory witness statements and other material, exculpatory discovery to appointed defense counsel, but restricted defense counsel from sharing or discussing that classified evidence with the defendant and failed to require the Government to produce the same important information in a form that could be shared with Moussaoui, JA92-108; (5) when Moussaoui chose to represent himself, the district court kept appointed counsel in the case and permitted those lawyers to appear in lieu of Moussaoui at critical stages of the proceedings, *see, e.g.,* CJA314-17; and (6) despite obvious red flags, the district court failed to hold a competency hearing before allowing Moussaoui to plead guilty. JA6362.

Moussaoui also was denied access to individuals ("Detainees") in the Government's custody, including those known to have planned the September 11th attacks. *See, e.g.,* JA1134-35; JA5957-58; JA5961-62; JA5963-95; JA6045-48; JA6132-37; JA6138-43; JA6088-93; JA6094-97. The Government insisted that excerpts from summaries of interrogations were adequate substitutes for access to Detainees, but the district court rejected this approach. *United States v. Moussaoui*, 365 F.3d 292, 295 (4th Cir. 2004) (summarizing procedural history),

JA1405; *see also United States v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004) (same) ("*Moussaoui II*"). The district court later struck the Government's notice of intent to seek the death penalty when the Government declined to produce the Detainees. *Id.* This Court subsequently vacated the sanctions order and requested that the district court consider whether new substitutions could be drafted that would be adequate substitutes for access to the Detainees. *Id.*

Following the denial of Moussaoui's petition for a writ of *certiorari* filed after this Court's decision on the Detainee-access issue, *Moussaoui v. United States*, 544 U.S. 931 (2005),[4] on April 22, 2005, Moussaoui entered a plea of guilty to all six counts in the Indictment. JA1432-33. Moussaoui admitted to being a member of al Qaeda, but he maintained at the time of his plea that he was not a participant in any conspiracy that included the September 11th terrorist attacks. JA1449-52.

The district court then set the case for a bifurcated penalty trial in which the jury would first determine whether Moussaoui was eligible for the death penalty and then, if he was so eligible, whether the district court should impose the death penalty. JA1472-74.

The death eligibility phase of the trial began on March 10, 2006. JA1580-96. The Government chose to proceed under the statutory provision that permits

[4] Moussaoui filed numerous *pro se* appeals to this Court that were summarily dismissed. *See, e.g.*, JA1115-19; JA1347-48; JA1353; JA1370-71; JA1381; JA1382; JA1383; JA1384-85; JA1388-89; JA1392-93; JA1396; JA1397; JA1398; JA1399-1400; JA1401; JA1402; JA1403; JA1404.

the death penalty if the defendant's act "directly resulted" in a death. *See* JA115-23. The district court then permitted the Government to take the death eligibility question to the jury on the theory that Moussaoui's lies at the time of arrest "directly resulted" in at least one death on September 11th because the Government could have stopped at least one attack if Moussaoui had told the truth. JA1591. After three weeks of trial, on April 3, 2006, the jury found Moussaoui death-eligible under Counts One, Three, and Four. JA4405-08.[5]

Phase II began on April 6, 2006. *See* JA4408A-08I. The question before the jury in Phase II was whether Moussaoui should be sentenced to death or to life in prison. JA4408A-08B, 4408G. The jury returned its verdict on May 3, 2006, and the jury did not find that Moussaoui should be sentenced to death. JA5579-87.

Based on the jury's verdict, the district court sentenced Moussaoui to multiple terms of life imprisonment without the possibility of parole. JA5604-05. The court entered judgment on May 4, 2006. JA5614-19.

On May 8, 2006, Moussaoui filed a motion to withdraw his guilty plea. JA5620-25. The district court denied the motion the same day. JA5626-27.

Moussaoui timely noticed this appeal on May 12, 2006. JA5628-29.

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[5] On June 24, 2005, defense counsel moved to strike the Government's notice of intent to seek death as to Counts One and Two in the Indictment. JA1456-63. On February 3, 2006, the Court granted the motion with regard to Count Two but denied the motion with regard to Count One. JA1494.

STATEMENT OF FACTS

A. THE SEPTEMBER 11th TERRORIST ATTACKS

On Tuesday, September 11, 2001, nineteen terrorists hijacked four commercial airliners within the United States as part of a coordinated attack. JA1412-13. The terrorists crashed two airplanes into the World Trade Center in New York. JA1412. One plane hit the Pentagon in Arlington, Virginia. JA1413. The fourth plane crashed into a field in Pennsylvania. JA1413. Almost 3,000 lives were lost in the attack, which was the worst domestic terror incident in United States history. JA1412-13.

Al Qaeda

The terrorist organization "al Qaeda" was responsible for the September 11th attacks.[6] For purposes of this appeal, only a few facts about that organization are relevant. Led by Usama bin Ladin and Ayman al Zawahiri, al Qaeda is organized in a manner that prevents operatives from knowing one another or even al Qaeda's plans. JA1665, 1673; JA1710. The result of this "compartmentalization" is that operatives travel to locations and await further instructions, often unaware of the direction they will receive. JA1737-38.

[6] Many of the names and words in this brief are transliterations from Arabic for which there is no well-established English equivalent. Unless necessary, the spellings in this brief follow those in the report of the National Commission on Terrorist Attacks Upon the United States (the "9-11 Commission Report").

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Planning the September 11th Attacks

The September 11th terrorist attacks are believed to be primarily the brainchild of Khalid Sheikh Muhammed ("KSM"), who apparently first conceived the idea of using aircraft as weapons. JA1795; JA4009. KSM was captured in March 2003 and is currently in the custody of the United States. JA3985-86.

The lead hijackers of the four planes on September 11th had been acquaintances since at least 1999. JA1797. Three of the September 11th pilots (Mohammed Atta, Marwan al-Shehhi, and Ziad Jarrah) moved to Hamburg, Germany in 1999 and began associating with Islamic extremists. JA1797-98. In Hamburg, they attended classes, socialized, lived, and worked with radical Islamic fundamentalists, such as Ramzi Binalshibh. JA1797-1805, 1815. The Hamburg group members were among the leaders of the attacks. JA1797.

To effectuate KSM's plan, certain al Qaeda members relocated to the United States beginning in 2000, JA812, 816-17, and enrolled in flight training, JA1797, JA3366D-66G. After receiving the approval of bin Ladin, KSM took responsibility for the initial training of the hijackers and assisted in arranging their flight instruction within the United States. JA4011-12. Some of the men who hijacked the planes on September 11th received financial aid from al Qaeda supporters abroad. JA1784-85; JA1790.

The nineteen hijackers worked and planned together long before the actual operation. JA1920. Some of the hijackers spent months together prior to the attacks, and some engaged in monthly face-to-face meetings to discuss tactical

plans. JA1918-20. Telephone records show that the nineteen men routinely communicated with one another prior to the attacks. JA1922.

At the time of his arrest, it was widely reported that Moussaoui was to be the "20th hijacker" in the September 11th attacks, but it has become abundantly clear that this was not the case.[7] There is no evidence that after Moussaoui arrived in the United States in February 2001, he communicated with or associated with any of the September 11th hijackers at any time. JA1923-25; JA1411. Further, by February 2001, each of the four pilot hijackers already had been in the United States for several months and already had obtained their pilot licenses. JA1926.

B. ZACARIAS MOUSSAOUI

By way of background, Zacarias Moussaoui was born in St-Jean-de-Luz, France on May 30, 1968, to parents of Moroccan descent. JA4663-65. When he was twenty-one, French officials evaluated Moussaoui for military service and

[7] Several books of record on the September 11th attacks confirm that Moussaoui was not intended to have any role in the attacks on that date. *See, e.g.*, LAWRENCE WRIGHT, THE LOOMING TOWER: AL QAEDA AND THE ROAD TO 9/11 351 (2006) ("Moussaoui was probably intended to be a part of a second wave of al-Qaeda attacks that would follow September 11th, most likely on the West Coast."); *see also* Office of the Inspector Gen., U.S. Dep't of Justice, A Review of the FBI's Handling of Intelligence Information Related to the September 11th attacks 179 (2006), *available at* http://www.usdoj.gov/oig/special/s0606/final.pdf (noting that there were no plans, correspondence, or names or addresses in Moussaoui's belongings that linked him directly to the September 11th attacks).

deemed him ineligible based on psychiatric issues noted during his medical examination.[8] JA6575-76.

Mental illness runs in Moussaoui's family. His father has been hospitalized for psychiatric treatment. JA6617. Moussaoui's sister Nadia has been diagnosed with manic depression and has had multiple psychiatric commitments. JA6617. Another sister, Djamila, has been diagnosed with schizophrenia and has been institutionalized approximately fifteen times. JA6617. Moussaoui's brother Abd-Samad was committed for psychiatric treatment in 1995. JA6617.

Moussaoui moved to the United Kingdom at the end of 1991. JA4702. In London, Moussaoui began attending the radical Finsbury Park Mosque. JA6577. Associates from that period reported that Moussaoui's ideas became extreme, that his demeanor became angry and erratic, and that Moussaoui began to focus on jihad. JA6577-78.

Between 1999 and 2000, Moussaoui spent time in Malaysia, Pakistan, and Afghanistan, attending training camps in Afghanistan and managing an al Qaeda guest house in Kandahar. JA6579. He subsequently pledged "*bayat*" (loyalty) to bin Ladin and became a member of al Qaeda. JA1410 (SOF ¶ 4).

Moussaoui entered the United States on February 23, 2001, under the Visa Waiver Program applicable to French citizens, which permitted him to remain legally in the United States until May 22, 2001. JA 1411 (SOF ¶ 4). Upon

[8] Moussaoui's score on the psychiatric portion of the evaluation indicated early symptoms of bipolar disorder or psychosis. JA6576. By all accounts, Moussaoui has never received any mental health care. JA6618.

arriving in the United States, Moussaoui traveled to Norman, Oklahoma, to begin flight lessons at Airman Flight School. JA1411 (SOF ¶ 12); JA2187. At the flight school, Moussaoui trained to fly small, single-engine planes. JA2187-88. His flight instructors characterized him as below average and observed that he could not maintain basic aircraft control. JA2189-90. By the time Moussaoui left Norman, he had logged approximately fifty-five hours in the air, but had never flown solo. JA2189-90; JA2209F.

In August 2001, after his visa had expired, Moussaoui traveled to Eagan, Minnesota to train at the Pan Am International Flight Academy. JA1411 (SOF ¶ 15); JA2209O. The Pan Am Academy offered access to a Boeing 747 flight simulator that was often used to train professional pilots. JA2209G-09H. Soon after his arrival in Minnesota, Moussaoui's instructor contacted the FBI Field Office in Minneapolis to express suspicions about him and the purposes of his flight training. JA2264-65. The instructor later said he was suspicious because Moussaoui paid for his training with cash, had no real aviation experience or knowledge, and expressed an unusual interest in the operation of aircraft doors during flight. JA2315-16. The FBI and the INS began investigating Moussaoui and, on August 16, 2001, arrested him for overstaying his visa. JA2332-33. Moussaoui never earned a private pilot's license for aircraft of any size. JA2189-90; JA2209F.[9]

[9] It should be noted that, contrary to press reports, it was actually September 11th hijacker Hani Hanjour who had no interest in learning how to take off or land aircraft, not Moussaoui. JA3366L.

After Moussaoui's arrest, the FBI's Minneapolis field office sought to investigate possible links between Moussaoui and terrorist organizations. JA2411-14. The Minneapolis field office requested a warrant to search Moussaoui's computer and other personal property. JA2416-17. However, FBI headquarters informed the field office that there was not a sufficient basis to obtain a warrant. JA2416-17, 2433. Headquarters concluded there was no probable cause to believe Moussaoui had committed a crime, and there was insufficient information to connect Moussaoui to a foreign power – a prerequisite to obtaining a search warrant under the Foreign Intelligence Surveillance Act ("FISA"). JA2416-17, 2435-36.

On September 11, 2001, Moussaoui was in federal custody awaiting deportation to France. JA2437.

On December 11, 2001, a grand jury in the Eastern District of Virginia indicted Moussaoui for conspiring to commit the September 11th terrorist attacks. JA7-38. The record from initial indictment to the filing of the notice of appeal is filled with significant errors that require vacatur of the judgment. The facts relating to each error are set forth in the corresponding sections below.

SUMMARY OF THE ARGUMENTS

For the reasons set forth below, this Court should vacate Moussaoui's plea. The district court barred Moussaoui from exercising core Fifth and Sixth Amendment rights, including the right to choose counsel, the right to communicate with counsel, the right to attend proceedings at critical stages, the right to effective

self representation, and the right to personally receive discoverable and exculpatory, material evidence. Thus, by April 2005, Moussaoui faced the choice between pleading guilty and facing a fundamentally unfair trial in a death-penalty case. This was an unconstitutional choice, and his plea was involuntary as a result.

This Court should also vacate Moussaoui's plea because it was unknowing, uncounselled, and entered in violation of Rule 11. For example, when Moussaoui pled guilty, each of his lawyers strongly recommended against his doing so, but his lawyers could not explain their recommendation because the district court had prohibited discussion on certain issues. Incredibly, defense counsel had evidence ***specifically found to be material and exculpatory as to Moussaoui***, but at the time of the plea, his lawyers could not discuss that evidence or even tell Moussaoui it existed. No plea can be knowing and counseled under these circumstances.

Similarly, the process leading to the plea was blatantly inconsistent with Rule 11. For example, the district court never held a competency hearing, disregarding the obvious need for one. And, the district court accepted the plea even though (1) Moussaoui was confused about the charges to which he was pleading; (2) there was no evidence that he participated in the September 11 conspiracy; (3) there was no basis for venue; and (4) Moussaoui was misinformed about the sentences available under the charges. This was, in other words, an invalid plea under Rule 11.

The sentencing process was also defective. The district court permitted the Government to present for the jury a *sui generis* theory of death eligibility – that

Moussaoui's lies at the time of his arrest "directly resulted" in a death in the September 11th attacks because if Moussaoui had told the truth, the government would have stopped at least one of the hijackings. This is a theory that would permit every member of an organized crime syndicate to be death eligible for failing to admit membership in the group. In truth, the district court should have entered judgment for Moussaoui on this defective theory, and Moussaoui should have been sentenced by the district court under circumstances in which the court knew it had the discretion to impose either life imprisonment or a term-of-years. As a result, if this Court agrees that Moussaoui should never have been death eligible, this Court should remand for a re-sentencing before the district court.

ARGUMENT

STANDARD OF REVIEW

Section I argues that district court rulings violated Moussaoui's constitutional rights and that those violations rendered his guilty plea involuntary. Each of the arguments in that section raise questions of law. This Court reviews legal issues *de novo* and factual findings for clear error. *United States v. Kennedy*, 372 F.3d 686, 696 (4th Cir. 2004); *see also United States v. Rhynes*, 218 F.3d 310, 320 (4th Cir. 2000).

Section II first argues that certain district court rulings violated Moussaoui's Fifth and Sixth Amendment rights and rendered his plea unknowing and uncounselled. These arguments again raise issues of law that this Court reviews *de novo*. *Id.* Section II also challenges the adequacy of the Rule 11 colloquy. This

Court reviews *de novo* the adequacy of the Rule 11 process, *United States v. Goins*, 51 F.3d 400, 402 (4th Cir. 1995), and this Court reviews errors in the Rule 11 process for harmless error. *United States v. Good*, 25 F.3d 218, 220 (4th Cir. 1994); *see also United States v. DeFusco*, 949 F.2d 114, 117 (4th Cir. 1991). Harmless error analysis requires the Court to evaluate whether the district court's Rule 11 errors affected Moussaoui's substantial rights. *DeFusco*, 949 F.2d at 117.

Section III raises errors that affected the sentences that the district court imposed on Moussaoui. The first argument asserts that the evidence admitted to establish Moussaoui's eligibility for the death penalty was legally insufficient. Whether evidence was sufficient is a legal question that this Court reviews *de novo*; however, on review, this Court views the evidence in the light most favorable to the Government. *United States v. Manbeck*, 744 F.2d 360, 390-91 (4th Cir. 1984). Section III also makes other legal arguments that this Court reviews *de novo*. *Rhynes*, 218 F.3d at 320.

DISCUSSION OF ISSUES

I. THE PERVASIVE DEPRIVATION OF MOUSSAOUI'S FIFTH AND SIXTH AMENDMENT RIGHTS RENDERED MOUSSAOUI'S PLEA INVOLUNTARY.

This is an important case for many reasons, but chief among them is that it raises the following fundamental question about Article III courts: Are federal courts willing to compromise or eliminate core constitutional protections if the indictment arises in the context of a terrorism case?

By the time of his indictment in the wake of the September 11th attacks, Zacarias Moussaoui was one of the most reviled people in America – a distinction he retained throughout the district court proceedings due in part to his admitted membership in al Qaeda and his repeated derision of the United States. Because the Government charged Moussaoui with involvement in an expansive conspiracy that included the September 11th attacks, along with other inchoate al Qaeda operations before and after September 11th, an enormous quantity of classified information in the hands of the Government and its intelligence agencies became both highly relevant and discoverable.

In this charged environment – filled with classified but relevant information – the Government chose to indict Moussaoui in an Article III court. Although there is a veneer of fair process to the district court proceedings, the forty months between indictment and Moussaoui's plea were filled with rulings that deprived Moussaoui of his core Fifth and Sixth Amendment rights. In any other case, these orders would not survive five minutes of appellate scrutiny. Among other things:

- Contrary to *Powell v. Alabama*, 287 U.S. 45 (1932), for the first five months after indictment, as a result of isolating conditions of confinement and lack of opportunities to communicate with the court, Moussaoui was not afforded a fair opportunity to hire the lawyer of his choice.
- Contrary to *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006), when Moussaoui attempted to exercise his right to retain his own counsel at the first post-arraignment hearing, the district court improperly and

unconstitutionally restricted Moussaoui's choice of counsel to lawyers: (1) who were willing to undergo a rigorous, invasive, and completely discretionary national security investigation; and (2) who were actually approved by the Department of Justice – the same agency prosecuting Moussaoui.

- Contrary to *Brady v. Maryland*, 373 U.S. 83 (1963), the Government produced discovery – both documentary evidence and witness statements from Detainees – to Moussaoui's lawyers, but not to Moussaoui himself. The district court failed to comply with the statute governing classified discovery – the Classified Information Procedures Act ("CIPA") – and to require the Government to produce non-classified substitutes,[10] and instead forbade Moussaoui's lawyers from sharing material, exculpatory information with their client.
- Contrary to *Geders v. United States*, 425 U.S. 80 (1976), the district court ordered that Moussaoui's lawyers could not discuss with Moussaoui any classified evidence produced in the case, including *Brady* evidence, and did not require that unclassified substitutes be produced. As a result, when he entered his plea, everyone in the case had evidence exculpating Moussaoui from involvement in the September 11th attacks – ***everyone except for Moussaoui.***

[10] The Government had options other than production of classified information, and those options are set forth *infra* at 39-40.

- Contrary to *McKaskle v. Wiggins*, 465 U.S. 168 (1984), when Moussaoui attempted to represent himself, he was barred from critical stages of the proceedings, restricted from seeing critical evidence, and deprived of the ability to effectively represent himself. In fact, against Moussaoui's wishes, standby counsel spoke for him at critical hearings.
- Contrary to *Kentucky v. Stincer*, 482 U.S. 730 (1987), Moussaoui was excluded from critical stages of the proceedings that were the equivalent of trial proceedings, including hearings addressing the admissibility of documentary evidence and the testimony of material witnesses.

The Supreme Court has squarely concluded that, individually, each of these errors is a "structural defect" – or one that "transcends the criminal process" – by depriving a defendant of those "basic protections" without which "no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminante*, 499 U.S. 279, 309-11 (1991) (internal quotation marks omitted). This case was thus marred by not one but many errors that the Supreme Court has determined to be structural defects. *See, e.g., Gonzalez-Lopez*, 126 S. Ct. at 2564 (deprivation of right to choose paid or *pro bono* counsel is a structural defect); *Geders*, 425 U.S. at 91 (restricting communication between counsel and client is structural defect); *McKaskle*, 465 U.S. at 177-78 n.8 (preventing defendant from effectively representing himself is structural defect); *Stincer*, 482 U.S. at 745 (excluding defendant from certain critical stage proceedings is structural defect).

The pervasiveness of the district court's errors left Moussaoui with a choice "between pleading guilty and submitting to a trial *the very structure* of which would be unconstitutional." *See United States v. Hernandez*, 203 F.3d 614, 626 (9th Cir. 2000). Under those circumstances, the plea was involuntary. *See id.*

Hernandez provides the framework for analyzing the impact of a structural defect on a plea. In that case, a district court erroneously denied a defendant's pretrial request to represent himself. *Id.* at 617. On appeal, the Ninth Circuit held that this structural defect rendered the defendant's subsequent guilty plea involuntary as a matter of law:

> To be voluntary, a plea must be one in which the defendant is permitted to choose between pleading guilty and undergoing a trial that comports with the fundamental principles the Constitution imposes. Were it otherwise, a plea would be valid even if procured by a court ruling that, absent a plea, a criminal defendant would be required to proceed to trial without counsel, or to submit to a trial before a biased judge . . . . Obviously, this is not the law. ***When a defendant is offered a choice between pleading guilty and receiving a trial that will be conducted in a manner that violates his fundamental Sixth Amendment rights, his decision to plead guilty is not voluntary***, for in that case, he has not been offered the lawful alternatives – the free choice – the Constitution requires.

Id. at 626-27 (emphasis added).

This Court's holding in *United States v. Mullen*, 32 F.3d 891 (4th Cir. 1994), is similarly on point. In *Mullen*, this Court invalidated a conviction and held that a defendant's waivers of the rights (1) to counsel, (2) to take part in jury selection,

(3) to make opening and closing statements, (4) to put on witnesses, (5) to present evidence in her defense, and (6) to cross-examine the Government's witnesses – each of which was *otherwise* knowing and voluntary – were invalid. This Court so held because the district court forced the defendant to make the unconstitutional choice between (a) waiving the right to counsel and trying her case *pro se* or (b) proceeding to trial with a lawyer she did not want. *Id.* at 892-98.

Here, Moussaoui's plea was similarly involuntary as a matter of law; further, the restrictions on Moussaoui also led to a plea that was unknowing. Moussaoui pled without ever seeing material, exculpatory evidence and exculpatory statements from material witnesses, including [redacted] This Court should accordingly vacate Moussaoui's plea and remand for a new – and fair – trial. *See North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (holding that guilty plea is not valid unless it is both knowing and voluntary).

The Government is sure to argue that it would have been impractical to have proceeded differently because Moussaoui was associated with al Qaeda and accused of participating in the September 11th attacks. On the contrary, as explained below, the district court could have avoided each of these significant errors simply by following the process laid out by Congress in CIPA. Instead, the district court improvised procedures that do not pass constitutional scrutiny. Worse, the Government is now imposing the unconstitutional procedures adopted by the district court in this case on others. *See United States v. Hassoun*, No. 04-

60001 (S.D. Fla. Mar. 29, 2006) (protective order requiring defense counsel to obtain security clearance); *see also* Mark Hamblett, *Lawyer Challenges Clearance Demand*, N.Y.L.J., Nov. 14, 2007, at 1. Reversal is thus necessary here because: (1) the rules adopted or validated in this appeal will be applied to other cases and (2) in this well-publicized case, the eyes of the world will be focused on whether United States courts follow consistent and fundamentally fair legal procedures regardless of the identity of the defendant or the charges faced.

A. THE DISTRICT COURT DEPRIVED MOUSSAOUI OF THE FUNDAMENTAL RIGHT TO CHOOSE COUNSEL.

The district court deprived Moussaoui of the right to secure counsel of his choice through two separate, but related, errors. First, between the time of Moussaoui's indictment on December 11, 2001, and the first post-arraignment hearing on April 22, 2002, Moussaoui was never afforded a chance to hire his own lawyer. Second, once Moussaoui raised the issue in the district court – complaining that he had not been afforded the chance to hire his own paid or *pro bono* counsel – the district court informed him, in violation of the Sixth Amendment, that he could only hire counsel who had been subjected to a national security investigation and approved by the Government. This deprivation of the fundamental right to choose counsel requires vacatur of Moussaoui's plea for the reasons set forth below.

1. Facts Relating to the Deprivation of the Right to Choose Counsel.

a. Initially, Moussaoui Was Not Afforded Any Reasonable Opportunity to Hire Counsel.

For the first five months after Moussaoui's indictment, the district court did not afford him any reasonable opportunity to hire the lawyer of his choice. Between the date of Moussaoui's indictment, December 11, 2001, and the first post-arraignment hearing on April 22, 2002, the district court did not ask Moussaoui whether he wanted to retain his own lawyer, or whether he needed counsel appointed for him. *See generally* JA217-79. Instead, with no hearing or consultation with Moussaoui about whether he needed appointed counsel,[11] the district court appointed Edward MacMahon, Esq., and Frank Dunham, Esq., as Moussaoui's counsel. JA39, 41. On December 19, 2001, Messrs. MacMahon and Dunham, along with Gerald Zerkin, Esq., entered appearances as appointed counsel for Moussaoui. JA40-42.

Moussaoui had no ability to contact lawyers on his own because, on January 7, 2002, the Government unilaterally imposed Special Administrative Measures ("SAMs") governing his confinement.[12] *See* JA150-65. Under the

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[11] It appears, for example, that the District Court never assessed Moussaoui for need under the Criminal Justice Act. *See* 18 U.S.C. § 3006A. In every case in which a person charged with a felony appears without counsel, the court is required to advise that person that he has a right to counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. *See* 18 U.S.C. § 3006A(b).

[12] The regulations set forth in 28 C.F.R. § 501.3 entitle the Government to impose Special Administrative Measures where, *inter alia*, the Attorney General finds that

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SAMs, which were approved by the district court at a hearing on April 22, 2002,[13] *see* JA211-12 (concluding that SAMs were "reasonable"), Moussaoui was banned from communicating with anyone who was not pre-cleared by the Government, including counsel. Moussaoui also could not engage in unmonitored conversations with his family and could not communicate with the media. JA150-65. These restrictions prevented Moussaoui from contacting any lawyers on his own.

In short, between the date of the indictment, December 11, 2001, and the first post-arraignment hearing, Moussaoui was prevented from contacting or retaining any lawyer of his choice because: (1) he was held in solitary confinement with no ability to contact anyone; and (2) the district court never asked him whether he wanted to hire his own lawyer.

b. The District Court Improperly Restricted Moussaoui's Choice of Counsel.

The April 22, 2002, hearing was Moussaoui's first opportunity to protest that he had not been allowed any opportunity to choose his own lawyers. *See* JA244-

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"there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons . . . ." 28 C.F.R. § 501.3(a). The SAMs are imposed for up to a one-year period, subject to renewal. 28 C.F.R. § 501.3(c). The SAMs imposed on Moussaoui were modified on April 4, 2002, s*ee* JA171, 192-207, and remained in effect throughout the prior proceedings in this case.

[13] At that time, the District Court also held that the burden was on anyone that the defense wished to have communicate with Moussaoui to identify themselves for investigation by the FBI before Moussaoui could meet with that person. JA211-12; JA258, 265.

45. At that hearing, Moussaoui recounted that from the time of arrest, he had requested a Muslim lawyer, JA229-31, 235, and he had the resources to pay for counsel. JA240, 242, 244-45. Moussaoui also explained how he planned to find a Muslim lawyer to represent him *pro bono* if necessary. JA227-31. He noted, among other things:

> [T]he fact that I was never asked – able to get my rights, to choose my own lawyer, because I had the financial means of this, okay, and I'm innocent until proven guilty, okay, so even if the government have blocked my money, I believe that they have no right and this should be fought in court.

JA244-45. Moussaoui made it clear to the district court that appointed counsel were forced upon him without any opportunity for him to choose his own lawyers. JA230-31, 240-45.

Moussaoui also described for the court in some detail the reasons that he believed having a Muslim lawyer on his defense team was necessary for his defense. JA244 ("I know that people who could have provided vital evidence for me will never, never speak to a non-Muslim."). Moussaoui explained that a defense team without a Muslim lawyer "cannot navigate in the Muslim environment, they have nobody of any Islamic understanding." JA244. Moussaoui also described the breakdown of his relationship with his appointed counsel, explaining that he "was in a complete state of mistrust with them from the beginning," JA239, and that he became more suspicious of his lawyers the longer it took for his appointed counsel to find Muslim counsel to assist. JA235.

In this context – with no chance to retain his own lawyer and alienated from court-appointed counsel – Moussaoui raised three possibilities in parallel: (1) that he retain his own lawyers; (2) that he be allowed to represent himself; or (3) that he be allowed to represent himself and retain a legal advisor to assist him out of court. The ensuing discussion during the April 22 hearing was somewhat confused; what is clear, however, is that the district court's rulings left Moussaoui with an unconstitutional choice.

Having never been afforded the opportunity to hire his own lawyer, Moussaoui suggested that he could represent himself with an attorney advisor:

> I, slave of Allah, Zacarias Moussaoui, have the intention in the shortest time practically possible to hire my own chosen Muslim lawyer to assist me in matters of procedure and understanding of the U.S. law. This Muslim lawyer chosen by me . . . will not assume any representation in the Court.

JA220.

Notwithstanding that Moussaoui had indicated repeatedly that he had sought to retain either *pro bono* or paid counsel, the Court initially advised him as follows:

> THE COURT: All right. Let me first advise you that you do have an absolute right under our law to be your own attorney, to proceed *pro se*. You already know that.
>
> You do not have a right to pick and choose the lawyer that you want appointed for you. Therefore, that request cannot and will not be granted.

JA245-46.

Second, Moussaoui repeated and clarified that he was not seeking new appointed counsel, but rather that he would attempt to pay for his own counsel of choice or find someone of his choice to represent him *pro bono*. JA240-45. In what was a critical decision, the district court ordered that even Moussaoui's choice of retained counsel – whether paid or *pro bono* – would be restricted to counsel who: (1) were willing to undergo a national security investigation; and (2) were Government approved:

> THE COURT: You have the right to hire an attorney at your own expense of your own choice. However, in this type of case where there are national security and classified documents, ***you don't have totally unrestricted choice even if you have the money available to hire an attorney, because the attorneys, as you know, because you've seen a copy of it, have to be able to be cleared to receive some of the information in this case, not all of it, but some of it.***

JA246 (emphasis added).

Faced with the unconstitutional choice to: (1) remain with appointed counsel he did not trust and did not want; (2) retain a lawyer who had to be Government approved; or (3) represent himself, Moussaoui requested permission to represent himself. *See, e.g.*, JA261. The district court withheld decision on Moussaoui's motion to proceed *pro se* until Moussaoui's competency could be considered. JA261-62.

In the days immediately following this hearing, Moussaoui filed a number of pleadings objecting to the deprivation of the right to choose his own lawyer:

- On April 25, 2002, Moussaoui filed a written *pro se* motion making virtually the same arguments he had made in court. JA213-16.
- Also on April 25, 2002, Moussaoui filed a *pro se* pleading reasserting his *pro se* status and stating that he would "not be bound by any of [appointed counsel's] decision[s] in the entire case." JA280.
- On April 29, 2002, Moussaoui moved for the "immediate eradication of the United States imposed appointed lawyer," arguing that he was "denied . . . the right of Due Process of Law, by which a defendants is publicly offered the right to employ his own lawyer or to represent himself (with or without a standby) or to waive this right and be given an appointed lawyer (if he cannot afford one)." JA336-37. He also argued that he was denied "effective assistance of counsel," in part, because he was not given access to a Muslim lawyer, "even as a consultant." JA337.

At the next hearing, on June 13, 2002, the district court first deemed Moussaoui competent and then granted *pro se* status after conducting an inquiry under *Faretta v. California*, 422 U.S. 806 (1975). JA518, 520-50. For several months after receiving permission to represent himself, Moussaoui attempted to obtain out-of-court advice from a Texas criminal defense lawyer named Charles Freeman (who called himself "Brother Freeman"). As described in greater detail at 104-107 below, the district court ultimately barred even consultation with this

lawyer because he refused to enter an appearance or undergo a full national security background check. JA783-88.

2. The District Court Unconstitutionally Denied Moussaoui His Choice of Counsel.

A criminal defendant must have "a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (finding due process violation where, among other things, defendants were not afforded a reasonable opportunity to retain counsel);[14] *see also, e.g.*, *Chandler v. Fretag*, 348 U.S. 3, 10 (1954) ("[A] defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."); *United States v. Childress*, 58 F.3d 693, 736 (D.C. Cir. 1995) (vacating conviction and remanding for determination whether trial court deprived defendant of right to counsel of choice and, if so, ordering that defendant "be afforded a reasonable opportunity to retain new counsel of choice"). Indeed, this core constitutional right has been found to be essential to the fundamental fairness of criminal proceedings. *Cf. Gonzalez-Lopez*, 126 S. Ct. at 2562-63 ("[The Sixth

[14] The *Powell* case arose under the Due Process Clause of the Fifth Amendment; however, courts have more recently held that the right to a reasonable opportunity to secure counsel arises under the Sixth Amendment. *See United States v. Romano*, 849 F.2d. 812, 820 (3d Cir. 1988) ("[T]he district court's failure to allow Romano the opportunity to retain counsel of choice . . . was violative of Romano's rights under the sixth amendment."); *Linton v. Perini*, 656 F.2d 207, 211 (6th Cir. 1981) ("A key consideration in the right to counsel under the Sixth Amendment is a reasonable opportunity to employ and consult with counsel.").

Amendment] commands . . . that a particular guarantee of fairness be provided-to wit, that the accused be defended by the counsel he believes to be best.").

Here, due to circumstances beyond his control, Moussaoui was not afforded any chance to hire his own lawyer between December 11, 2001, the date of the indictment, and April 22, 2002, the date of the first post-arraignment hearing. As discussed above, during this period of time, the district court did not advise Moussaoui of his right to choose counsel and never asked him if he wanted to secure the services of counsel other than his court-appointed lawyers. *See generally* JA217-79. In a similar vein, Moussaoui was not interviewed for CJA purposes, *see supra* at n.11, which is another point at which defendants are ordinarily informed of their rights and afforded a chance to retain counsel. In addition, Moussaoui was subjected to the SAMs beginning January 7, 2002, which prevented him from contacting any lawyers on his own. As a result, the district court never gave him the opportunity to find the lawyer of his choice.

Moreover, when Moussaoui finally was informed of his right to retain a lawyer, the district court placed a significant – and unconstitutional – restriction on his choice of counsel: that any lawyer he hired had to receive a national security clearance. JA258. These restrictions deprived Moussaoui of his Sixth Amendment right to choose his own counsel.[15]

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[15] Moussaoui objected to this as well. JA298 ("[I] was denied by deceitful mean the ability to hire my own Muslim standby lawyer (vetoed by FBI, CIA, Secret Service))".

That is, two years ago, the Supreme Court confirmed that the right to choose paid or *pro bono* counsel is fundamental, and – subject to the lawyer being minimally qualified and the timing of the retention not disrupting the court's docket – the denial of a defendant's choice of paid or *pro bono* counsel always renders the process fundamentally unfair and unreliable. *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2565-66 (2006). Indeed, subject to few exceptions, the right to select paid or *pro bono* counsel is at the core of the "particular guarantee of fairness . . . provided" by the Sixth Amendment. *Id.* at 2562. It is considered "the root meaning of the constitutional guarantee." *Id.* at 2563; *see also Caplin & Drysdale Chtd. v. United States*, 491 U.S. 617, 625 (1989) ("[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds."). The right to counsel of choice is so central that its denial taints the entire structure of the proceedings and can never be harmless. *Gonzalez-Lopez*, 126 S. Ct. at 2564; *United States v. Panzardi Alverez*, 816 F.2d 813, 818 (1st Cir. 1987) ("A defendant's choice of counsel cannot be reduced to a mere procedural formality whose deprivation may be allowed absent a showing of prejudice. The right to choose one's counsel is an end in itself; its deprivation cannot be harmless."); *Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981) ("Harmless error tests are not relevant to the instant case [in which defendant was denied counsel of choice].").

In *Gonzalez-Lopez*, the trial court denied *pro hac vice* admission to the defendant's counsel of choice because the lawyer violated a local rule that the court applied erroneously. 126 S. Ct at 2560. The *Gonzalez-Lopez* Court had "little trouble" concluding that wrongful deprivation of counsel qualifies as structural defect because "the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial." *Id.* at 2564. The *Gonzalez-Lopez* Court did acknowledge that a district court could restrict the choice of counsel under certain narrow circumstances, including based on "the demands of its calendar"; minimal qualifications of counsel – such as bar membership or absence of conflicts; ethical considerations; and "the needs of fairness." *Id.* at 2565-66 (internal citations and quotation marks omitted). Although the "right to counsel of choice 'is circumscribed in several important respects,'" *id.* at 2561 (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)), the *Gonzalez-Lopez* Court held that the Sixth Amendment "commands . . . that the accused be defended by the counsel he believes to be best." *Id.* at 2562; *see also Mullen*, 32 F.3d at 896 ("A defendant's right to have a lawyer of his or her own choosing is an essential element of the Sixth Amendment right to assistance of counsel."); *Fuller v. Diesslin*, 868 F.2d 604 (3d Cir. 1989) (holding denial of choice of counsel was *per se* error).

Under *Gonzalez-Lopez*,[16] a district court may only reject paid or *pro bono* counsel who are not minimally qualified and may restrict substitution of counsel under other narrow circumstances. It is thus unconstitutional for a court to restrict unduly a defendant's ability to choose his qualified paid or *pro-bono* counsel. Here, the requirement of a national security background check was unnecessary, imposed a heavy burden on prospective counsel, and unconstitutionally afforded the Government a "veto" over Moussaoui's choice of counsel.

3. There Was No Basis for the District Court's Restrictions on Moussaoui's Right to Choose Counsel.

a. There Was No Need for Counsel to Be National Security Cleared in This Case.

Although it may seem counter-intuitive on first reading, there was no need for the district court's requirement that any lawyer representing Moussaoui obtain a national security clearance. The district court imposed this requirement based on the assumption that if the Government possesses classified discovery, defense counsel must receive national security clearance and then receive information that cannot be shared with the defendant. Similarly one might have assumed that information in Moussaoui's mind at the time of his indictment itself was classified such that anyone who spoke with him had to have a top secret clearance. These

[16] *See also Panzardi Alverez*, 816 F.2d at 817 (vacating conviction and remanding for new trial because defendant was denied counsel of choice); *Linton*, 656 F.2d at 211-12 (reversing denial of writ of habeas corpus based on denial of choice of counsel); *United States v. Liszewski*, No. 06-CR-130, 2006 WL 2376382, at *10 (E.D.N.Y. Aug. 16, 2006) (a district court "must err on the side of non-disqualification.").

assumptions are incorrect because (1) CIPA contemplates that where classified evidence is implicated, it will be produced to the defendant, if at all, in unclassified form; and (2) as the Government reasoned when it chose to indict Moussaoui in a civilian court, Moussaoui did not possess any classified information. As a result, there was no need for counsel to be national security cleared.

(1) Under CIPA, Classified Discovery to Be Produced by the Government Must Be Produced to the Defendant in Unclassified Form.

There is, of course, a tension between the Government's constitutional discovery obligations and the need to protect classified information when that information is relevant to a criminal prosecution. Congress has, however, solved this problem in a manner that relieves the Government of any obligation to turn over classified information and, therefore, eliminates any need for defense counsel to be top-secret cleared. Congress enacted CIPA, 18 U.S.C. App. III, to address the problems associated with "greymail," a practice in which a criminal defendant threatens to disclose classified information at trial in order to encourage the Government to drop the charges against him. *United States v. Wilson*, 721 F.2d 967, 975 (4th Cir. 1983); *see also United States v. Libby*, 429 F. Supp. 2d 1, 13 (D.D.C. 2006) (prosecutor arguing that defendant's discovery requests for classified materials constituted "a transparent effort at 'greymail'"). To that end, CIPA was designed "to provide procedures under which the government may be made aware, prior to trial, of the classified information, if any, which will be

compromised by the prosecution." *United States v. Collins*, 720 F.2d 1195, 1197 (11th Cir. 1983).

Aside from its protections for classified material, CIPA does not supplant ordinary discovery principles. *See, e.g., Libby*, 429 F. Supp. 2d. at 7 (*quoting United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989)) (CIPA "creates no new rights or limits on discovery of a specific area of classified information . . . [,] it contemplates an application of the general law of discovery in criminal cases to the classified information based on the sensitive nature of the classified information."). Nor does it supplant the Rules of Evidence. *See, e.g., United States v. Baptista Rodriguez*, 17 F.3d 1354, 1363-64 (11th Cir. 1994); *United States v. Smith*, 750 F.2d 1215, 1220-21 (4th Cir. 1984); *Yunis*, 867 F.2d at 621-22. As explained in CIPA's legislative history, "the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would without this Act." S. Rep. No. 96-823, at 4302 (1980); *see also United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005) (CIPA's fundamental purpose is to "protect[] and restrict[] the discovery of classified information in a way that does not impair the defendant's right to a fair trial"); *see also United States v. Moussaoui*, 365 F.3d 292, 304 (4th Cir.), *on rehearing*, 382 F.3d 453, 468 (4th Cir. 2004).

In short, "[a]lthough CIPA contemplates that the use of classified information be streamlined, courts must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim to innocence." *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990). Consistent with that

summary of the information from the classified documents. *See id.* Third, the court may authorize the Government to substitute a statement admitting the relevant facts that the classified information would tend to prove. *See id.*

At the end of the CIPA § 4 process, either the defendant possesses substantially the same information as a defendant would in a non-CIPA case, or the Government faces the possibility that the court could dismiss the indictment under CIPA § 6. *See* 18 U.S.C. App. III § 6(e)(2) ("Whenever a defendant is prevented . . . from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information."). CIPA certainly does not contemplate the production of information to a defendant's counsel in a manner that would prevent it from reaching the defendant. *See* 18 U.S.C. App. III § 6(b)(1) (discussing availability of classified information in relation to "the ***defendant***") (emphasis added).

(2) Information in Moussaoui's Mind Could Not Be Classified.

To be clear – nobody has ever suggested that Moussaoui possessed classified information or gave this as a reason for requiring that his lawyers be top-secret cleared. In fact, the contrary is true: At the time of his indictment, the Government explained that it chose an Article III court for this prosecution – rather than a military tribunal – because Moussaoui possessed no classified information.[18]

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18 Q. Why did the President consider but then reject the idea of having Moussaoui go before a military tribunal?

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This is confirmed by the President's own delineation of executive classification authority, which makes clear that information in Moussaoui's mind is not classified.[19]

The Executive Branch has the exclusive authority to classify information. *United States v. Collins*, 720 F.2d 1195, 1198 n.2 (11th Cir. 1983) ("It is an Executive function to classify information, not a judicial one."). Presently, that authority is discharged through Executive Order 13,292, 68 Fed. Reg. 15,315 (Mar.

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> MR. FLEISCHER: . . . So during his meeting with the Attorney General, the President asked a series of questions about civilian versus military trial, and asked if this were to be decided in a civilian court, a civilian criminal court, would national security be in danger, would sources or methods be compromised. The President was satisfied that the answers to those questions were no. The Attorney General recommended that this go to a civilian court; the President concurred. And so, that's what took place.

Press Briefing by Ari Fleischer, Office of the Press Secretary (Dec. 12, 2001) ("Fleischer Press Briefing").

[19] Indeed, the district court implicitly recognized as much when it noted that a question posed by Moussaoui to a Detainee could not, by definition, be classified. CJA346 ("COURT: But you still have the problem that Moussaoui knows what he knows. He can ask [redacted] any kind of question that he wants, and whatever he asks [redacted] is coming from his own brain. It's not coming because he has reviewed some classified document. Clearly, any question Moussaoui puts to [redacted] can't possibly be classified.")

25, 2003), which sets forth what information is classified or classifiable, and who has the delegated authority to classify information.[20]

Under the Executive Order, "original classification authority" is defined as "an individual authorized in writing, either by the President, the Vice President in the performance of executive duties, or by agency heads or other officials designated by the President to classify ***information*** in the first instance." *Id.* § 6.1(cc) (emphasis added). Section 6.1(s), in turn, defines "[i]nformation" as "any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the ***control*** of the United States Government."[21] Finally, "[c]ontrol" means "the authority of the agency that originates information, or its successor in function, to regulate access to the information." *Id.* § 6.1(s).

Consistent with these definitions, the regulations implementing the Executive Order limit classification to information that originated with federal agencies. 6 C.F.R. § 7.21(a) (2007). Under the regulations, classified information must be "owned by, produced by or for, or . . . under the control of the United States Government." *Id.* § 7.21(a)(2). Importantly, the fact that the Government has an individual under arrest does not mean, for these purposes, that they

[20] Executive Order 12,958, which governed classification prior to 2003, *see* 60 Fed. Reg. 19,825 (Apr. 17, 1995), was amended in March 2003 by Executive Order 13,292. *See* 68 Fed. Reg. 15,315. All citations herein are to the Order as amended by Exec. Order No. 13,292; the amendments did not substantively affect the classification provisions cited herein. *See* Exec. Order No. 12,958.

[21] Emphasis added.

"control" information in that person's mind, because the definition of "control" specifically refers to "the authority of ***the agency that originates information*** . . . to regulate access to the information." *See* Exec. Order No. 13,292, § 6.1(s) (emphasis added).

A few conclusions flow from these definitions. First, and most obviously, information that is *in the possession of* the United States Government is subject to classification. This would include, for instance, any knowledge obtained through the Government's own intelligence-gathering activities. Second, information obtained by a defendant that is "owned by, produced by or for, or is under the control of the United States Government" may remain classified even after indictment. This would include, for example, sensitive information a defendant gained while working for the United States Government, whether rightfully obtained or stolen, or, for example, classified information about interrogation and detention techniques that were used on a defendant.

But, by these same definitions, information in the mind of *the defendant*, that is *not* owned by, produced by or for, or under the control of the Government, cannot be classified. For instance, knowledge that Moussaoui gained from being a member of al Qaeda is not "owned by," "produced by or for," or "under the control" of the United States Government and, therefore, cannot be "classified information." As the Government concluded when it chose to indict Moussaoui in a civilian court rather than a military tribunal, Moussaoui had no classified

information. Any knowledge that he did have, therefore, would not be a proper basis for requiring that his lawyers be top-secret cleared.

b. The District Court Erred in Mandating a National Security Investigation for Defense Counsel

As shown above, neither the information possessed by Moussaoui nor the classified information possessed by the Government provide a justification for the district court's restriction on Moussaoui's right to choose counsel. Moussaoui had no classified information, and the Government had the option of using CIPA to manage any classified information that it saw fit to protect. The only other possible explanation for the district court's decision is that the court believed that Moussaoui would be better off if his counsel were able to see the classified information than he would be otherwise. But with due respect to the district court, this is an insufficient basis upon which to deprive the defendant of the constitutionally protected right to counsel of his choice. It is up to the defendant to determine how he wishes to conduct his defense: if he wishes to forgo his counsel's access to classified information so that he can have the benefit of counsel of his choice, that is his right. A court should not be permitted to force counsel upon an unwilling defendant by invoking purported benefits to the defendant. In short, there was no valid reason to require any defense lawyer in this case to receive a national security clearance.

Furthermore, the district court's restriction was not only unnecessary, it also unconstitutionally afforded the Government an absolute, discretionary veto over Moussaoui's choice of counsel. This is a structural problem. As noted above, the

Gonzalez-Lopez Court made clear that the right to choose counsel has a few narrow limitations – including that a lawyer be a member of the bar, conflict free, and minimally qualified to handle the case. However, the requirement for national security clearance is inconsistent with the limitations under *Gonzalez-Lopez* on the right to choose counsel. For example, Moussaoui's request for counsel occurred at the beginning of the case, and the management of the district court's docket therefore was irrelevant.

Similarly, the requirement that defense counsel obtain a national security clearance is exceedingly demanding and arbitrary, and has nothing to do with the qualifications or competency of counsel. To obtain a clearance, counsel must receive "a favorable determination of eligibility for access." Exec. Order No. 13,292, § 4.1. To meet this standard, the lawyer must be a United States citizen and subject himself to an exhaustive investigation into his "personal and professional history," including employment, citizenship information on relatives, medical and police records, drug use, and financial records. *See* Exec. Order No. 12,968, § 3.1(b), 60 Fed. Reg. 40,245, 40,250 (Aug. 2, 1995); Standard Form 86, *Questionnaire for National Security Positions* ("SF 86"). In fact, SF 86 requires detailed information relating to all aspects of the lawyer's life, including (1) a listing of addresses for the past seven years and identification of a reference for each address; (2) an employment history and explanations for any periods of unemployment – no matter the length of time – with references; (3) identification of any former spouse(s) with contact information; (4) identification of all

immediate family members – including step- and half-siblings and in-laws; and (5) identification and contact information for any family or close friends who are foreign nationals. *See* SF 86. SF 86 also requires admission of consultation or treatment for mental health related conditions. *Id.* SF 86 further inquires into alien registration, delinquent loans or taxes, bankruptcy, judgments, liens, or other financial obligations, agreements involving child custody or support, alimony or property settlements, arrests, convictions, probation, and or parole.[22] *Id.*

The investigation must:

> affirmatively indicate[] loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information.

Exec. Order. No. 12,968, § 3.1(b). A person may attain "eligibility for access" only where "facts and circumstances indicate access to classified information is *clearly* consistent with the national security interests of the United States," *id.*, and, "any doubt" is "resolved in favor of the national security." *Id.*[23]

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[22] Even matters such as "speeding" violations and twenty-year-old legal troubles are considered "negative information" that can jeopardize successful completion of a background investigation. Office of Personnel Management, *General Questions and Answers about OPM Background Investigations*, *available at* http://www.opm.gov/Products_and_Services/Investigations/FAQs.asp ("OPM FAQs") (last visited Dec. 19, 2007).

[23] Even if a person is deemed eligible to receive classified information, he must have a "need-to-know" specific information before he may gain access to it. Exec.

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Further underscoring that the national security investigation is not consistent with *Gonzalez-Lopez*, the final decision to grant a person access to classified information rests within the sole discretion of the Executive Branch, as the Supreme Court has recognized:

> [The President's] authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.

Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988); *see also* Executive Order No. 12,968 § 3.1(b) (providing that a "determination of eligibility for access to [classified] information is a *discretionary* security decision based on judgments by appropriately trained adjudicative personnel"). The President has delegated this authority to the heads of Executive agencies, Exec. Order No. 13,292 § 1.3(a), including the Attorney General, and determinations that applicants are not eligible for access to classified information are non-appealable beyond the department investigating the eligibility – here, the Department of Justice headed by, again, the Attorney General. 28 C.F.R. §§ 17.15(a), 17.47 (h), (g). In short, the Attorney General, who actively participated in key decisions in the prosecution of Moussaoui, *see* Fleischer Press Briefing; *see also* CJA876-78 (Affidavit of

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Order No. 12,968, § 2.5. *See also* 28 C.F.R. § 17.45. Thus, the Attorney General could bar access based on its assessment that there is no "need-to-know."

Attorney General John Ashcroft confirming, among other things, his "participation in this case"), also held the ultimate veto on whom Moussaoui could choose as his counsel.

Thus, a national security clearance is not an acceptable limitation on the right to counsel of choice under *Gonzalez-Lopez*. Unlike those exceptions for bar membership and basic competency, a national security clearance has nothing to do with competency, and is discretionary, burdensome, invasive, and subjective. Moreover, imposing a national security clearance requirement had a chilling effect on Moussaoui's ability to hire the lawyer of his choice.

c. The District Court's Order Requiring a National Security Background Check Denied Moussaoui His Sixth Amendment Right to Choice of Counsel.

"Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. . . . It is generally the defendant's right to make a choice from the available counsel in the development of a defense." *Fuller v. Diesslin*, 868 F.2d 604, 610 (3d Cir. 1989). By the time the district court ordered that any counsel involved in the case would have to obtain national security clearance, Moussaoui had been in custody for nearly eight months and under indictment for five months without an opportunity to hire his own paid or *pro bono* lawyer. At his first post-arraignment appearance, the district court imposed the clearance requirement and left Moussaoui with the choice of either restricting his choice of counsel to lawyers approved by the Government or foregoing counsel altogether.

Moussaoui chose to represent himself, rather than subject himself to counsel approved by the Government.[24]

This error rendered Moussaoui's plea involuntary because it left him with the unconstitutional choice between pleading guilty and submitting to a fundamentally unfair trial, deprived of the assistance of counsel of his choice. *See Hernandez*, 203 F.3d at 626; *Mullen*, 32 F.3d at 892-98. Once a court finds a violation of this right, it must reverse rather than conduct "a speculative inquiry into what might have occurred in an alternate universe" in which the Constitution was correctly applied. *Gonzalez-Lopez*, 126 S. Ct. at 2565. This Court should therefore vacate the plea and require a new proceeding untainted by this error.

B. THE DISTRICT COURT VIOLATED THE SIXTH AMENDMENT WHEN IT RESTRICTED MOUSSAOUI'S ABILITY TO COMMUNICATE FREELY WITH APPOINTED AND STANDBY COUNSEL.

Within weeks of the initial indictment, the district court entered a protective order that prohibited Moussaoui's lawyers from discussing classified evidence with Moussaoui except with permission from the court or Government. After the court forced Moussaoui to use counsel he did not want (even in a standby role) and

[24] Moussaoui also objected on several occasions that the SAMs restrictions and the background investigations prevented him from receiving legal advice: "the SAM, and the extraordinary actions by the Attorney General towards Muslims and Arabs since September 11, have created a climate in which it [was] difficult . . . to obtain needed Islamic advice and consultation." JA145. Indeed, at least one "Islamic scholar," referred to as "John Doe" in the proceedings below, was "unwilling to undergo the vetting process" by the FBI in order to meet with Moussaoui. JA145; JA6878-79.

required those lawyers to obtain national security clearances, the Government disclosed significant quantities of classified materials, including material, exculpatory evidence, to defense counsel. The district court then restricted defense counsel from sharing or discussing those same materials with Moussaoui. Indeed, the district court refused to permit information to be shared with Moussaoui even after concluding the information was material and exculpatory. *See, e.g.*, CJA311-13, CJA1054-56. The district court's orders were inconsistent with CIPA's procedures for the production of material to the defendant (discussed above) and patently unconstitutional because they restricted the communication between lawyer and client in violation of the Sixth Amendment.

1. Facts Relating to Restrictions on Moussaoui's Ability to Communicate with His Lawyers.

a. Moussaoui's Inability to Obtain Exculpatory or Discoverable Evidence.

On January 18, 2002, the Government sought entry of a protective order ("Protective Order") to govern classified discoverable material in its possession, *see* 18 U.S.C. App. III § 3; *see also* JA78-91, which the district court entered on January 22, 2002. JA92-108.

The Protective Order provided that CIPA would apply to the case. Critically, the Protective Order afforded the Government substantial control over who ultimately would have access to classified discovery or evidence:

> No defendant, counsel for defendant . . . shall have access to any classified information involved in this case unless that person shall first have . . . received the

> necessary security clearance as determined by the Department of Justice Security Officer working in conjunction with the CSO, or approval from the Court . . . or the government for access to the particular classified information in question; approval by the Court shall not occur but upon a showing to the Court's satisfaction of a "need to know" the particular classified information...

JA97. The Protective Order also entitled the Government to control or know what information defense counsel chose to discuss with Moussaoui:

> If counsel for the government advise defense counsel that certain classified information or documents may not be disclosed to the defendant, then defense counsel, employees of defense counsel, and defense witnesses shall not disclose such information or documents to the defendant without prior concurrence of counsel for the government, or, absent such concurrence, prior approval of the Court. Counsel for the government shall be given an opportunity to be heard in response to any defense request for disclosure to the defendant of such classified information.

JA104.

As noted *supra* at 39, when the Government possesses discoverable classified material, it has the ability, under CIPA § 4, to submit the classified discovery to the district court *ex parte* and *in camera* for approval of non-classified substitutes. This did not occur. Instead, the district court permitted the Government to do two things that are inconsistent with CIPA and the Fifth and Sixth Amendments. First, the district court permitted the Government to produce classified discovery directly to "cleared" defense counsel but then restricted defense counsel via the Protective Order from sharing or discussing that

information with Moussaoui.[25] Second, the district court reviewed CIPA § 4 filings and instead of requiring the Government to produce unclassified substitutes, the district court permitted the Government to produce substitutes that, oddly, were still classified. Again, defense counsel were barred – due to the Protective Order – from sharing these classified "substitutes" with Moussaoui – even those that the court held contained material and exculpatory information. *See, e.g.*, JA1083.[26]

Throughout the discovery process, the Government produced two general categories of classified information: (1) documentary discovery and (2)

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[25] *See, e.g.*, JA432-35; SJA13; SJA9-10; SJA11-12; JA495-97.

[26] The court then permitted the Government to produce classified discovery to standby counsel with instructions that the information not be shared – either in hardcopy or through discussions – with Moussaoui. *See* JA92-108 (ordering defense counsel not to share classified discovery with Moussaoui); *see also* CJA78 (noting defense counsel's receipt of classified discovery in June 2002); CJA167 (noting defense counsel's receipt of classified discovery in August 2002); CJA214 (noting defense counsel's receipt of classified discovery in September 2002); CJA230 (noting defense counsel's receipt of classified discovery in September 2002); CJA234 (noting defense counsel's receipt of classified discovery in December 2002); CJA383 (noting defense counsel's receipt of classified discovery in January 2003); CJA417 (noting defense counsel's receipt of classified discovery in February 2003); CJA690 (noting defense counsel's receipt of classified discovery in March, April, and May 2003); CJA702 (noting defense counsel's receipt of classified discovery in June 2003); CJA830-2 (noting defense counsel's receipt of classified discovery in summer of 2003); CJA921 (noting defense counsel's receipt of classified discovery in July, August and September 2003); and CJA1027 (noting defense counsel's receipt of classified discovery in June 2004). After receiving classified discovery, defense counsel repeatedly protested to no avail their inability to share classified discovery with Moussaoui. *See* JA130-65; JA432-58; JA865-901; CJA66-9; CJA147-66.

intelligence summaries.[27] Classified documentary discovery was governed by the protective order entered on January 22, 2002. *See* JA92-108. As set forth above, this protective order restricted cleared counsel from sharing certain discovery with their client. *See* JA92-108 at ¶ 11. Standby counsel immediately – and repeatedly throughout the remainder of the proceedings – protested this restriction. *See, e.g.* JA130-65; JA432-58; JA865-901; CJA66-9; CJA147-66.

Once classified documentary evidence was produced to standby counsel, the district court required standby counsel – with no input from Moussaoui – to follow the CIPA § 5 designation process in order to use the evidence at trial. *See* JA97. The CIPA § 5 process typically requires defense counsel to notify the Government of the defense's intent to use classified evidence at trial and gives the Government the opportunity to object or propose substitutes for the classified evidence. 18 U.S.C. App. III § 5. The process is meant to provide the Government with a statutory means of controlling a defendant who obtains classified information prior to the discovery process and later seeks to disclose, or threatens to disclose, the classified evidence during trial – in other words, to prevent "greymail" against the Government. *Id.* Despite the fact that Moussaoui possessed no classified evidence prior to trial – and as a result of the protective order, obtained none through the discovery process – the district court placed the onus on standby counsel to sort

[27] Under this Court's ruling in *Moussaoui II*, CIPA does not directly govern the intelligence summaries at issue in this case. 382 F.3d at 472 n.20. However, in that same case, this Court applied CIPA by analogy to these intelligence summaries – a convention we follow here.

through all of the classified documents and designate select documents for trial. Obviously, the protective order barred standby counsel from working with Moussaoui on the designation process and getting his input on any classified documents that might be significant to his case, notwithstanding repeated requests to that effect.

Moussaoui himself, and his appointed or standby defense counsel,[28] repeatedly objected to these patently unconstitutional restrictions. For example, on April 12, 2002, Moussaoui, through appointed counsel, filed a motion for relief from the conditions of confinement set forth in the Protective Order (and the SAMs), arguing that they precluded him from exercising his right "(i) to participate in the preparation of his own defense, (ii) to become 'fully informed' so that he [could] knowingly and intelligently exercise other fundamental rights, and (iii) to communicate with counsel and consultants/experts freely and securely." JA132. The district court upheld the restrictions set forth in the Protective Order and ruled that the SAMs were "reasonable." JA211.

Similarly, before Moussaoui began representing himself, his then-appointed counsel anticipated the constitutional prejudice that would result should the district court try to enforce the terms of the Protective Order on Moussaoui as a *pro se* defendant. Thus, on June 7, 2002, defense counsel filed a motion to allow

[28] Before June 14, 2002 and after November 13, 2003, court-appointed counsel represented Moussaoui. JA571, JA1378. During the interim, Moussaoui represented himself *pro se* and – against his wishes – was assigned the court-appointed lawyers as his standby counsel. *See, e.g.*, JA574, JA614.

Moussaoui access to classified information and relief from the SAMs if permitted to proceed *pro se*. JA430-31; JA432-58. At the June 13, 2002, hearing, appointed counsel argued that Moussaoui should have access to all the information he would need to defend himself. JA519. The district court never granted the request.

Moussaoui was so frustrated by the deprivation of his access to information that he attempted to change his plea in July 2002 while denying any involvement in the conspiracies with which he was charged. JA858. On July 16, 2002, the grand jury returned the Indictment.[29] JA831; JA838-39. On arraignment for this Indictment, Moussaoui attempted to enter "an affirmative plea, a pure plea."[30] JA840. The district court initially refused to recognize the plea and entered a plea of not guilty on Moussaoui's behalf. JA842. But, after some further discussion with counsel, Moussaoui stated that he wanted to change his plea to guilty because he feared that the district court would rescind his ability to proceed *pro se*, that he would be gagged at trial, and that the jury would sentence him to death. JA857-61. Before it would accept a guilty plea, however, the district court requested that standby counsel address the factors that should be considered before accepting the

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[29] This Indictment added a "Notice of Special Findings" pursuant to the Federal Death Penalty Act. JA831-32. The new language alleged that victims died as a "direct result" of an act by Moussaoui. JA831.

[30] According to Black's, a "pure plea" or "affirmative plea" is "[a]n equitable plea that affirmatively alleges new matters that are outside the bill. If proved, the effect is to end the controversy by dismissing, delaying, or barring the suit. A pure plea must track the allegations of the bill, not evade it or mistake its purpose." Black's Law Dictionary 1190 (8th ed. 2004).

plea. JA865. Standby counsel argued that, before Moussaoui be allowed to plead guilty, he must be informed, *inter alia*, of any material and exculpatory classified information that he had not yet seen.[31] JA867. The court did not do so and instead rejected the plea because Moussaoui denied any role in the September 11th attacks.[32] JA1023, 1029-33.

Thereafter, Moussaoui filed a number of motions requesting access to classified evidence and requesting that the Government declassify some of the information in the case. *See, e.g.*, JA1066; JA1067; JA1079; JA1099. For instance, on August 1, 2002, Moussaoui moved "to get access to so called secret evidence," arguing that the Government had "classified everything in [his] favor as Secret" and that he "must be given direct access to material that prove that I am not

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[31] Standby counsel also advised the court that Moussaoui might have believed that he was pleading guilty to a different conspiracy than the conspiracy alleged in the Indictment. JA869-71. He might have been prepared to admit "that he is a member of al Queda [*sic*]," but not that he entered "into an agreement which involved the attacks on 9/11"; in other words, "[h]e might be admitting his participation in a separate but uncharged conspiracy, but not the conspiracies related to 9/11 which are the conspiracies he is charged with." JA869. Standby counsel noted that Moussaoui had previously "admitted that he was a member of al Queda [*sic*]" and that "he had pledged 'bayat' to Osama Bin Laden," but "he has never admitted that he was involved in a conspiracy knowing that an object of the conspiracy was the attack on 9/11 or, more importantly, that with knowledge of the plan, he agreed to its undertaking." JA869-70. Standby counsel also urged the district court to re-examine Moussaoui's competency both with respect to proceeding *pro se* and pleading guilty. *See* JA872-75. The district court denied standby counsel's request for such a re-examination. *See* JA993-94.

[32] The court rejected his plea because it was "clear" that he was "not admitting to the essential elements of the specific conspiracies that are described" in the Indictment. JA1036.

9/11." JA1066. The same day he filed a motion to "force the US government to declassified information in my case," in which he argued that "the 6 amendment give the right to an accuse to see evidence against him." JA1067-68.

In a similar vein, Moussaoui objected to the imposition of security cleared counsel because it prevented him from getting access to important evidence. On August 7, 2002, Moussaoui asserted that "Standby lawyer have been put in place to prevent me to get access to secret information" and that as he was "a *pro se* lawyer, [he] must see the evidence against [him]." JA1080, 1082. Additionally, on August 12, 2002, Moussaoui argued that:

> the US government is saying that I should be executed because the evidences prove that I was not 911 are classified. Classified by who? The US government of course, who is seeking my death.

JA1099. He further argued that "[n]owhere in the US Constitution it is said that to exercise your fundamental right of self defense you should renounce to the fundamental right to a fair fight, a fair trial." JA1100.

The court denied these motions, finding that "the United States' interest in protecting its national security information outweighs the defendant's desire to review the classified discovery" and concluding that "Mr. Moussaoui's Fifth and Sixth Amendment rights are adequately protected by standby counsel's review of the classified discovery and their participation in any proceedings held pursuant to [CIPA], even though the defendant will be excluded from these proceedings." JA1125. As a result, Moussaoui represented himself in some proceedings, and as to some issues, but he was forced to rely on standby counsel in CIPA hearings and

with respect to classified discovery, even though standby counsel were not allowed to share that information with Moussaoui. *See, e.g.*, JA1136 ("[T]he Court will hold a closed hearing pursuant to the [CIPA] . . . on Wednesday, October 2, 2002 . . . . For the reasons stated in our Order of August 23, 2002 [JA1124], the defendant will not be present."); *see also* CJA317B-17C (Government's argument regarding what [redacted] testimony would be if called to testify at trial); CJA320-21 (court order, based on January 30, 2003, CIPA hearing, requiring [redacted] CJA585, 587-93, 596-97, 604-05, 608-09 (parties and court addressing admissibility of [redacted]tatements by substitution rather than live testimony at trial).

As the case progressed, Moussaoui repeatedly expressed his frustration with the denial of his rights: "the Judge and the lawyer and the prosecution have taken control of the case by having everything of substance classified and under seal." JA6029. As a result of these restrictions on the ability to communicate, his relationship with court-appointed standby counsel also continued to deteriorate. For example, Moussaoui was not told by counsel that the Government had abandoned its highly publicized "20th hijacker"" theory and had come up with yet another theory, now claiming that Moussaoui was to pilot a fifth plane into the White House. JA6104-09. He gleaned this information from inconsistent redactions appearing in a memorandum opinion and in a transcript, both pertaining to a classified hearing. *See* JA1207; JA1169; JA6104-09. While Moussaoui was

mandate, CIPA does not diminish the Government's obligation to provide exculpatory material to the defendant in compliance with *Brady v. Maryland*, 373 U.S. 83 (1963). *See United States v. Moussaoui*, No. CR. 01-455-A, 2003 WL 21263699, at *4 (E.D. Va. Mar. 10, 2003) (holding that *Brady* principles apply in the CIPA context, including information negating guilt as well as that affecting a potential sentence). Nor does CIPA alter the defendant's Fifth and Sixth Amendment rights to a fair trial and compulsory process. *See id.* at **4-6; *see also United States v. Moussaoui*, No. CR. 01-455-A, 2003 WL 22258213, at *2 (E.D. Va. Aug. 29, 2003); *United States v. Moussaoui*, 282 F. Supp. 2d 480, 482 (E.D. Va. 2003).

CIPA provides courts with a variety of means of preserving the confidentiality of classified information. What is critical here is that CIPA does ***not*** contemplate that information would be produced to a defendant's lawyers ***in lieu of*** production to the defendant. In that vein, Section 4 of CIPA expressly sets out three options for the Government when it seeks to avoid producing discoverable classified information, each of which may be exercised *in camera* and *ex parte*.[17] First, the Government may seek approval from the district court to delete or redact specified items of classified information from the documents to be made available to the defendant. *See* 18 U.S.C. App. III § 4. Second, the Government can seek approval from the district court to substitute an unclassified

[17] "The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone." 18 U.S.C. App. III § 4.

appalled that "after more than 1 1/2 year after 9/11 the *pro se* defendant does not know about it[] CLASSIFIED," he complained in particular that standby counsel "did not of course tell [him] a word" about the new development. JA6105-06.

b. Facts Relating to Attempts to Interview Other Detainees.

In September 2002, Moussaoui and his standby counsel requested access to Abu Zubaydah, a detainee held by the United States government overseas. JA5957-58; CJA181-215. In September and October of 2002, Moussaoui further requested pre-trial access to two other enemy combatant witnesses, [redacted] JA1134-35; JA6045-48. Standby counsel subsequently requested access to both witnesses on Moussaoui's behalf. JA6004A-6004O; CJA233A-233G.

Following briefing, on January 31, 2003, the district court ordered that the Government make [redacted] available for trial testimony through a videotaped deposition pursuant to Federal Rule of Criminal Procedure 15. CJA320-21. The court concluded that [redacted] "would be able to provide material, favorable testimony on the defendant's behalf – both as to guilt and potential punishment." CJA437-38. The court also noted that [redacted] had already made exculpatory statements with regard to Moussaoui's role in potential terrorist activities. CJA438. The court then determined that the defense did not

make adequate showings regarding the materiality and favorability of testimony from Zubaydah or [redacted]. CJA440.

The Government immediately appealed the district court's ruling, claiming that the district court should provide the Government the opportunity to propose substitutions for [redacted] direct testimony. JA1148. On April 14, 2003, this Court remanded the Government's appeal with instructions that the Government be given the opportunity to propose substitution summaries of the detainee's interrogation statements, rather than provide access to the detainees themselves. *Moussaoui II*, 382 F.3d at 477 (summarizing procedural history). The district court was to determine "whether the proposed substitutions, if any, 'w[ould] provide the defendant with substantially the same ability to make his defense as would the disclosure ordered by the district court." *Id.*

On April 24, 2003, the Government filed an *ex parte, in camera* request for approval to produce intelligence summaries of [redacted] statements in lieu of the raw intelligence cables. CJA452-56. Because the Government did not want certain information from the raw cables to be produced – [redacted] the Government filed *ex parte* motions with the district court seeking permission to produce intelligence summaries instead of the original cables. *See* CJA582-83 (discussing district court's procedure); *see also* Docket No. 190 (Government's *ex parte* motion for protective order pursuant to CIPA § 4); Docket

No. 223 (Government's *ex parte* motion for protective order pursuant to CIPA §4); and Docket No. 273 (Government's *ex parte* motion for protective order pursuant to CIPA § 4).[33] It appears that the Government submitted proposed CIPA § 4 orders, which were entered in edited form by the district court.[34] The Government followed this procedure for later productions of intelligence summaries.[35]

Moussaoui opposed the Government's proposed substitutions. CJA511-16; JA1238-39; CJA525-29; JA1245-61; JA1264-67; JA1277-86; JA1287-92; CJA651-60 and CJA661-68. Moussaoui contended that the substitutions were not accurate or reliable and were the product of, among other things, [redacted] CJA525-29; JA1245-61; JA1264-67; JA1277-86; CJA651-60. Moussaoui repeatedly highlighted the importance of [redacted] testimony in

[33] The Government filed approximately 15 such *ex parte* motions prior to Moussaoui's plea. The motions have never been produced to defense counsel and, accordingly, are not included in the Classified Joint Appendix.

[34] *See* CJA311-13; CJA419-21; CJA449-51; CJA575-77; CJA648-50; CJA686-88; CJA711A-11Y; CJA712-14; CJA856-58; CJA929-31; CJA1054-56; CJA1665-67; CJA1668-70; CJA1671-73; CJA674-76.

[35] On April 24, 2003, the District Court ordered that the Government's proposed substitution of [redacted] testimony be turned over to Moussaoui. JA1167-68. The District Court stated that the Government's failure to turn over the substitution to Moussaoui would violate the remand of the Fourth Circuit. JA1167-68. Additionally, because only Moussaoui could inform his counsel as to what exculpatory information might be missing from the substitutions, a full evaluation of the adequacy of the substitutions would be impossible without Moussaoui's input. JA1167-68. The proposed substitution for [redacted] was the only substitution Moussaoui saw before his guilty plea or before certain substitutions were admitted at trial.

that it should establish he was not a part of the September 11th conspiracy. JA1245-61; CJA651-60; CJA661-68.

At a May 7, 2003, hearing, the district court inquired into the reliability of the substitutions, asking whether, among other things, there was raw material of the interrogations that could be compared to the intelligence summaries. CJA588. Two days later, on May 9, 2003, the Government submitted a declaration to the district court on an *ex parte* basis to provide assurance to the district court about the reliability of the written summaries as a substitute for access to the witnesses. CJA650. A portion of the declaration was shared with defense counsel – but not Moussaoui – pursuant to a CIPA §4 protective order, CJA650, and in that declaration, the Government represented that there were no tapes of [redacted] interrogations. *See* Ex. D to Remand Motion.

Shortly thereafter, the district court determined that the Government's proposed substitution for [redacted] was not reliable because the court was unable to determine "whether the intelligence reports upon which it is based accurately reflect wha[redacted] has said to interrogators." CJA676-77.

In the midst of pleadings relating to Zubaydah, [redacted] Moussaoui sought access to [redacted] March 4, 2003, and [redacted] on March 10, 2003. JA6088-93; JA6094-97. Several months later, standby counsel also moved for pre-trial access to [redacted]

CJA717-807. The district court thereafter ordered the Government to produce for deposition [redacted] stating that each had material, exculpatory information, both as to Moussaoui's guilt or innocence and potential punishment. CJA837-853; CJA854-55. The Government ultimately produced the proposed substitutions, CJA859-62, but refused to present any of the enemy combatant witnesses for depositions, videotaped or otherwise. JA1320-23.

The district court rejected the Government's proposed substitutions and found instead that the Government could not provide sufficient substitutions for certain detainees' testimony. JA1317-18. In light of the Government's refusal to produce the detainees for deposition, the district court struck the Government's Notice of Intent to Seek a Sentence of Death and Notice of Special Findings and further precluded the Government from presenting any evidence or argument at trial that Moussaoui was involved in, or had knowledge of, the planning or execution of the attacks of September 11th. JA1326-40.

The Government appealed the district court's order of sanctions on October 7, 2003. JA1343. On September 13, 2004, this Court affirmed in part, vacated in part, and remanded by published opinion. *See Moussaoui II*, 382 F.3d at 456-57. This Court affirmed the district court's finding that the enemy combatant witnesses could provide material, favorable testimony on Moussaoui's behalf, and agreed with the district court that the Government's proposed

substitutions for the witnesses' deposition testimony were inadequate. *See Moussaoui II*, 382 F.3d at 456-57. This Court reversed the district court's finding that adequate substitutions could not be crafted and remanded with instructions for the district court and the parties to draft substitutions under certain guidelines. *Id.* at 457. This Court also vacated the district court's order of sanctions. *Id.*

The district court later permitted the substitution of other intelligence summaries for the raw intelligence cables. The Government produced these substitutions through the CIPA § 4 process and pursuant to the Government's *Brady* and other disclosure obligations. The district court's CIPA § 4 orders were largely similar, but there were a number of different holdings encompassed in the orders with regard to the character of the covered classified material. Several of the protective orders expressly stated: "the Court further finds that ***some of the information sought to be protected is discoverable*** under *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule 16 of the Federal Rules of Criminal Procedure, but that such discovery value is outweighed [by] the potential danger to national security that might ensue after disclosure" (emphasis added). *See* CJA311-13; CJA1054-56; *see also* CJA929-31 (stating that "***the information sought to be protected is discoverable*** under *Brady v. Maryland* . . . and [Rule 16], and that such discovery value may not be outweighed by the potential danger to national security that might ensue after disclosure" (emphasis added)).

On the other hand, some of the orders simply concluded that "the Court further finds that ***some of the information sought to be protected is either discoverable*** under *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule 16 of the Federal Rules of Criminal Procedure, or that such discovery value is outweighed by the potential danger to national security that might ensue after disclosure" (emphasis added). *See* CJA419-21; CJA449-51; CJA575-77; CJA686-88; *see also* CJA11A-11Y and CJA712-14 (declaring the same with *all* information covered by the orders).

Some of the CIPA §4 orders explicitly held that the covered material should be shared with "cleared" standby counsel. *See, e.g.*, CJA311-13; CJA419-21; CJA449-51; CJA686-88; CJA711A-11Y; CJA1054-56; *see also* CJA929-31 (stating that the covered material should be shared with standby counsel on a preliminary basis). However, in a number of the orders, the court expressly deleted proposed language stating that the "Government's classified substitutes [would] provide the defendant with substantially the same ability to make his defense as would disclosure of the specific intelligence cables and reports." CJA419-21; CJA449-51; CJA575-77; CJA686-88; CJA711A-11Y; *see also* CJA929-31 (stating that "the Government's classified substitutes will not provide the defendant with substantially the same ability to make his defense as would disclosure of the specific intelligence cables and reports.").

With the exception of a single [redacted] substitution, *see supra* n. 35, The Government never produced versions of the witness summaries for Moussaoui to review. As a result Moussaoui never saw any of the intelligence summaries prior to his plea or prior to trial.

c. Moussaoui's Lack of Access to Evidence Prior to the Plea

This case proves – to the extent it was not crystal clear beforehand – the insidious nature of "secret evidence" when used in a criminal case in an Article III court. We briefly highlight here ***some*** of the evidence in two categories that Moussaoui's lawyers had, but that he did not have, at the time of the plea in April 2005.[36] Even a quick review of this critical information – most of which the district court had already found to be material and exculpatory at the time of the plea – makes clear that Moussaoui's plea was not only involuntary, but also unknowing. *See, e.g., McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003).

Classified Documentary Evidence

The first category of discovery that Moussaoui did not have – but his lawyers did have – at the time of the plea, was the classified documentary evidence produced by the Government as part of its obligation to produce *Brady* and other

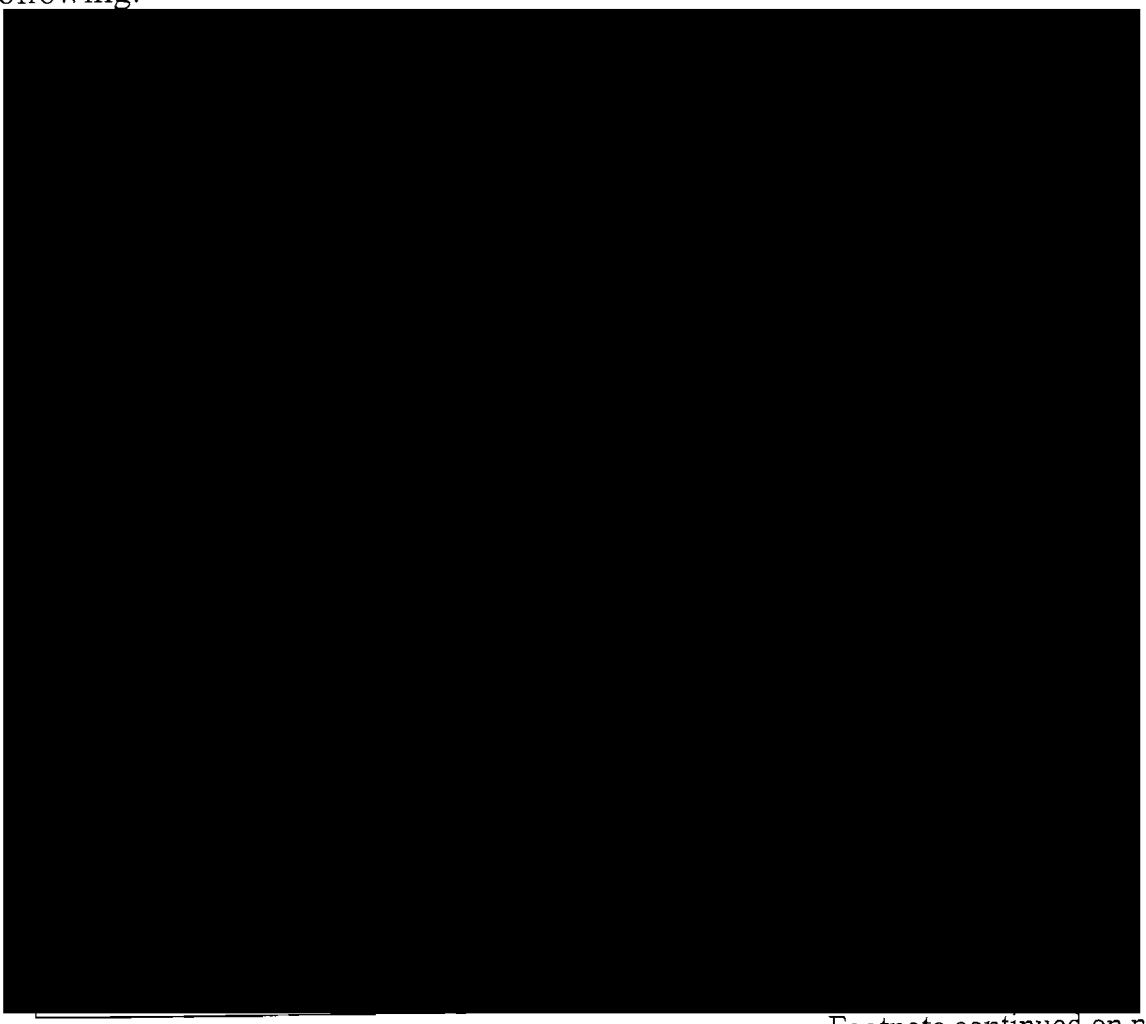
[36] Because Moussaoui has not seen or commented on the classified discovery, there well may be other evidence that was produced that was critically important to his defense but that could not be identified as such without input from Moussaoui.

discoverable material under the federal rules. As discussed above, after production, defense counsel tried, without the assistance of Moussaoui, to identify materials from the production that contained information relevant and material to the defense. *See* CJA70-79, CJA102-08, CJA167-69, CJA214-15, CJA230-37, CJA383-85, CJA417-18, CJA689-704, CJA830-34, CJA921-23, CJA1027-28, CJA1172-78. In these and other filings, defense counsel identified some documents that were critical for Moussaoui to review in order to properly understand the risks he was facing at trial, but the district court never permitted any of them to be shared or discussed with Moussaoui.

For example, on July 5, 2002 – a few weeks after defense counsel received its first production – defense counsel filed a pleading with the court to identify at least one classified sample document that Moussaoui should review before pleading. CJA66-69. [redacted] Moussaoui never saw this document before he entered his plea.

There are literally hundreds of documents identified by defense counsel that would similarly have been critical for Moussaoui to see before he pled.[37] For

[37] The exculpatory documents discussed here are but a small percentage of the total material documents produced to defense counsel but kept from Moussaoui by court order. *See* JA92-108. Additional documents include, but are not limited to, the following:



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example, the Government had identified Moussaoui publicly as the "20th hijacker." However, in another designation filed March 28, 2005, [redacted] This would have been a critical fact for Moussaoui to know before he pled.

In a similar vein, the Government had on occasion identified Moussaoui publicly as the potential pilot of a fifth plane on September 11th. CJA424. The Government produced to Moussaoui's counsel [redacted]

Footnote continued from previous page

[redacted]

[redacted]

[redacted] would have been very important for Moussaoui to know before his plea.

Another example of evidence that would have been critical for Moussaoui to see and discuss with his lawyers before he pled was information, presumably turned over by the Government [redacted]

[redacted] The language in the document, along with the fact that the Government produced it, provide strong indications that it should have been shared with Moussaoui before he pled.

Classified Detainee Statements

The second category of discovery that Moussaoui never saw but his counsel did, was a series of classified intelligence summaries from a number of detainees. For example, on April 22, 2003, pursuant to protective orders issued by the district

court, the Government disclosed summaries of intelligence reports regarding the interrogations [redacted] *See* CJA311-13, 449-51. The district court reviewed this information and specifically held that "some of the information . . . is discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule 16 of the Federal Rules of Criminal Procedure[.]" *See* CJA311-13, 449-51. Nonetheless, the court limited the disclosure of the summaries to only "cleared standby counsel." *See* CJA311-13, 449-51. [redacted] Moussaoui was not allowed to see before pleading guilty. *See* CJA1363.

[redacted] specifically exonerated Moussaoui from participation in the attacks. Among other things, the [redacted] summaries, [redacted] stated that:

[redacted]

[38] Defense counsel initially received summaries of the interrogation of [redacted] On May 30, 2003, defense counsel designated some of this material for use at trial. CJA689-93.

CJA697.

After reviewing the summaries, the district court found that [redacted] provide material and favorable testimony on Moussaoui's behalf," and that he would be "invaluable" in proving that Moussaoui "had no knowledge of, and was not involved in, the September 11th plot." CJA846. The court stated that "at minimum, such testimony would eliminate the possibility of a death sentence, and could exculpate [Moussaoui] from the specific conspiracies charged in this case." CJA846-47. Because these exculpatory statements [redacted] were so important, defense counsel specifically requested permission to share this information with Moussaoui. CJA872-75. But the district court did not grant this request, and failed to even advise Moussaoui that this type of information was in his lawyers' possession. Despite the fact that [redacted] statements undermined the Government's theory of the case, Moussaoui was

nonetheless denied access to any of the statements before he pled guilty. CJA1615.

[redacted] provided material and exculpatory statements about Moussaoui. CJA849. Among other things, the [redacted], established that:

[redacted] despite the Government's insistence that Moussaoui was meant to be the last hijacker. CJA400, 849. [redacted] CJA700.

- While [redacted] had many contacts with the September 11th hijackers – [redacted] and remaining in constant contact with September 11th tactical leader Mohamed Atta – [redacted] did not interact in any way with Moussaoui. CJA849.

~~TOP SECRET//HUMINT//ORCON/NOFORM//MR~~

- [redacted]

[redacted] CJA849.

As [redacted] the district court found that [redacted] "could provide material, exculpatory testimony on the defendant's behalf." CJA849. The court further found that [redacted] statements "support[ed] the defense contention that Moussaoui was not involved in the September 11th operation." CJA849. Moussaoui was nonetheless not permitted to see the [redacted] summaries before pleading guilty. CJA1615.

In addition to [redacted] summaries, the Government produced a number of other interrogation summaries prior to Moussaoui's plea that standby counsel were barred from sharing with Moussaoui:

- [redacted]

[39] Defense Counsel received information regarding [redacted] on December 2, 2004, following a CIPA § 4 protective order. CJA1054-56, 1120. On March 28, 2005, defense counsel designated some of this material for use at trial. CJA1172-1236. On February 28, 2006, the district court held that certain portions of [redacted] statements were relevant and material. CJA1919-22.

[redacted]

CJA1183.

- [redacted]

[redacted] CJA1018, 1201-06.

- [redacted]

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[40] Defense counsel first received information regarding [redacted] May 19, 2004 following issuance of a CIPA § 4 protective order. CJA929-31, 1018. On March 28, 2005, defense counsel designated sections of this material for use at trial CJA1172-78. The district court deemed [redacted] immaterial to Moussaoui's defense. CJA1921.

[41] The Government turned over information regarding [redacted] on October 26, 2004 following issuance of a CIPA § 4 protective order. CJA1038-41. On March 28, 2005, defense counsel designated portions of this material for use at

Footnote continued on next page

[redacted]

[redacted] CJA1213.

- [redacted]

[redacted] CJA1919-22.

[redacted]

[redacted] CJA422, 426.

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trial. CJA1172-77, 1210. On February 28, 2006, the district court determined that portions of this information were, in fact, relevant and exculpatory. CJA1919-22.

[42] Defense counsel first received summaries of the interrogation [redacted] December 2, 2004, following entry of a CIPA § 4 protective order. CJA1054-56. On March 28, 2005, defense counsel designated some of this material for use at trial. CJA1172-77. The court ultimately found [redacted] testimony to be cumulative. CJA1919-22.

[43] The Government initially turned over classified interrogation summaries [redacted] on June 1, 2002. On July 26, 2002, defense counsel designated a portion of these summaries for use at trial. CJA70-79. In a March 10, 2003, Memorandum Opinion, the district court concluded that the defense had not made an adequate showing that the [redacted] evidence was material and favorable. CJA422, 440.

- [redacted] **Abu Zubaydah,**[45] [redacted]

We summarize the statements of these witnesses *infra* at 125-135.

For each such summary, the district court's protective order designated the material discoverable under both *Brady* and Rule 16, but limited its disclosure to cleared standby counsel. *See* CJA311-13, 929-31, 1038-40, 1054-56. As with the other classified documents produced by the Government, the summaries were neither declassified nor produced in an unclassified version, and Moussaoui was barred from assisting his counsel in determining their significance prior to the entry of his plea and prior to trial.

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[44] The Government began turning over classified summaries of the interrogation of [redacted] on June 2, 2003. *See* JA92-108. On June 6, 2003, defense counsel designated sections of these summaries for use at trial. CJA0702-04. On February 28, 2006, the district court deemed this material to be relevant and material to Moussaoui's defense. CJA1919-22.

[45] Defense counsel first received summaries of the interrogation of Zubaydah on January 21, 2003. CJA311-13. On February 5, 2003, defense counsel designated some of this material for use at trial. CJA383-87.

[46] Defense counsel first received summaries of the interrogation of [redacted] on January 21, 2003 following a CIPA § 4 protective order. CJA311-13. On February 5, 2003, defense counsel designated portions of the [redacted] summaries for use at trial. CJA383-85. In a March 10, 2003 Memorandum Opinion, the district court underscored the importance of [redacted] testimony. CJA422, 426.

2. The Restrictions on Counsel's Ability to Communicate with Moussaoui Rendered Moussaoui's Plea Involuntary.

The Sixth Amendment guarantees the right to *effective representation* of counsel. In that vein, the Sixth Amendment prohibits courts from imposing anything but the most *de minimis* restrictions, upon the defendant's communication with counsel, because court interference in the communication between lawyer and client necessarily deprives a defendant of that right. *See, e.g.*, *Frazer v. South Carolina*, 430 F.3d 696, 709 (4th Cir. 2005) ("[R]epresentation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, . . . [which includes] the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.") (emphasis removed); *see also United States v. Triumph Capital Group, Inc.*, 487 F.3d 124, 129 (2d Cir. 2007) ("Effective assistance of counsel requires that the defendant be allowed to communicate with his or her attorney.").

Thus, it is well established that a court generally cannot restrict the communications between a lawyer and a client. *See Geders v. United States*, 425 U.S. 80, 91 (1976). In *Geders,* the Court held that a court order preventing a defendant from speaking with counsel during an overnight recess from his trial testimony violated the Sixth Amendment. *Id.* Although two lower courts had deemed this appropriate based on the need to sequester witnesses, the Supreme Court rejected the proposition that these interests could justify interference with a defendant's right to counsel:

> To the extent that conflict [exists] between the defendant's right to [counsel] . . . and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper 'coaching,' ***the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel.***

Id. at 91 (citing *Brooks v. Tennessee*, 406 U.S. 605 (1972)) (emphasis added).

Geders explained the critical need for a defendant to have access to counsel in navigating criminal proceedings. *See id.* at 88 ("Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance."). Quoting from *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), the *Geders* Court added:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A defendant] is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

425 U.S. at 88-89.

The Supreme Court reiterated the importance of a defendant's unrestricted access to counsel in *Perry v. Leeke*. *See* 488 U.S. 272, 284 (1989) (citing *Geders*, 425 U.S. at 88) ("It is the defendant's right to ***unrestricted access*** to his lawyer for advice on a variety of trial-related matters that is controlling." (emphasis added)). While the *Perry* Court permitted a limited restriction on communication between defendant and counsel during a fifteen-minute recess in the defendant's testimony,

it did so on the basis of a narrow exception to *Geders*: when a defendant becomes a witness, he has no constitutional right to counsel *during* the course of his testimony and, in *Perry*, the fifteen-minute recess was so short that there was a "virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony." *Perry,* 488 U.S. at 284. But the *Perry* Court again rejected any contention that a court can abridge a defendant's right to counsel in order to satisfy other interests. *Id.* Thus, regardless of whether the government's interests are of "national security" or some other potency, "the defendant's right to a trial that comports with the Fifth and Sixth Amendments prevails over the governmental" interest where the restrictions truly impair the ability to communicate with counsel. *Moussaoui II*, 382 F.3d at 474.

Geders and *Perry* stand for the proposition that a substantive prohibition on communication between defendant and counsel cannot withstand constitutional scrutiny except when narrowly crafted to limit any such prohibition to communication about a defendant's testimony while he or she is testifying. Courts across the federal circuits have invalidated orders limiting communications under anything but the narrowest of circumstances precisely because they inhibit the free flow of information that defendants need to discuss with their attorneys. *See United States v. Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006) ("*Perry* recognized a defendant has a 'constitutional right' to discuss matters other than his own testimony with his lawyer" (quoting *Perry*, 488 U.S. at 284)); *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) (court cannot forbid communications

that "would as a practical matter preclude the assistance of counsel across a range of legitimate legal and tactical questions"); *Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986) (prohibiting communications on testimony-coaching can "have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the courts' directive"); *id.* at 1515 (Scalia, J., concurring) ("[A] prohibition on attorney-defendant discussion during substantial recesses, even if limited to discussion of testimony, violates the [S]ixth [A]mendment.").

This Court reached the same result in reversing the conviction of a criminal defendant based on restrictions placed on the ability of a lawyer to communicate with his client. In *United States v. Cobb*, 905 F.2d 784, 792 (4th Cir. 1990), this Court explained that "[t]o remove from [the defendant] the ability to discuss with his attorney any aspect of his ongoing testimony [would] effectively eviscerate[ ] his ability to discuss and plan trial strategy." This Court recognized that the trial court's order was narrowly drawn to limit the discussion of ongoing testimony; nonetheless, this Court reversed and ordered a new trial, concluding that, to expect a fair trial with such limitations on communication would defy reason. *Id.*

Here, scarcely a month after Moussaoui was indicted, the district court issued a Protective Order that curtailed communications between Moussaoui and counsel in numerous ways. JA92-108. Among other things, the Protective Order barred Moussaoui from reviewing or discussing any classified evidence with his attorneys. JA97. The Protective Order also explicitly prohibited defense counsel

from disclosing to Moussaoui any evidence, however relevant or exculpatory, that fell under the purview of the Order. JA103. If defense counsel violated the court's Order by communicating information to Moussaoui, their actions could "constitute violations of United States criminal laws." JA105.[47] As a practical matter, this Protective Order imposed restrictions far more constitutionally offensive than the order at issue in *Geders*.

Beginning in early 2002, the Government took advantage of these orders and produced significant quantities of discovery to defense counsel with the instruction – consistent with the district court's orders – that the information could not be shared with the defendant. The district court's orders were clearly inconsistent with *Geders* and *Perry*, and Moussaoui was not able to exercise his right to counsel under these restrictions. Not only was Moussaoui prevented from receiving advice, but his lawyers were effectively hamstrung from preparing their case. How were the lawyers to interpret the evidence and identify important witnesses? It is likely, for example, that Moussaoui would have been able to identify for his lawyers evidence in the documents that was critically important but not obviously

[47] The Order also provided a means by which the Government could file various pleadings with the court that Moussaoui's counsel were prohibited from discussing with him. JA101. Further, defense counsel were only permitted to discuss classified evidence within the confines of a secure facility to which Moussaoui did not have access, thereby preventing Moussaoui from ever engaging in open discussion with his attorneys regarding potentially significant evidence. *See generally* JA101-04.

so. Indeed, Moussaoui's lawyers could not have possibly understood everything they were reading without the help of their client.

In addition, a typical attorney-client relationship is characterized by trust. *United States v. Boigegrain*, 155 F.3d 1181, 1188 (10th Cir. 1998) ("Of all the actors in a trial, defense counsel has the most intimate association with the defendant."). In Moussaoui's case, his lawyers had to consistently tell him they were unable to share crucial evidence with him, and these circumstances irreparably damaged the attorney-client relationship. *See* CJA327 (COURT: "One of the reasons [Moussaoui] does not trust them is that he reads in the paper things about his case that could affect a very important trial for him, and yet his lawyers can't talk to him about it . . . ."); *see also* JA6105-06. Any plea subject to these types of restrictions cannot possibly be voluntary.

As noted above, these district court orders were inconsistent with CIPA. Under CIPA §§ 4 and 6, the Government has the obligation to either (1) produce the required information to the defendant; (2) seek approval for a substitute or redacted version on an *ex parte* and *in camera* basis from the district court; (3) agree to the finding of a fact if no substitute is available; or (4) suffer dismissal of the indictment. The district court's orders ignored this system and placed defense counsel in the untenable situation of holding classified discovery that they could not share with their own client. Had the district court followed CIPA, there would have been no Sixth Amendment violation. Far from drawing the limitation on communications between Moussaoui and defense counsel as narrowly as possible,

see Perry, 488 U.S. at 284, the district court opted to impose the broadest possible limitations. Such infringement on Moussaoui's right to communicate freely with counsel constituted structural error. *See Geders*, 425 U.S. at 91.

Where a *Geders* violation takes place, the likelihood that the outcome is unreliable is "so high that a case-by-case inquiry is unnecessary" and reversal is automatic. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *see also Geders*, 425 U.S. at 91 (reversing conviction without regard to harmlessness of error). In light of the foregoing, Moussaoui's plea was involuntary because the district court left him with the unconstitutional choice between submitting to a fundamentally unfair trial – one in which he would not be able to discuss critical evidence with his counsel – and pleading guilty. *See United States v. Hernandez*, 203 F.3d 614, 626 (9th Cir. 2000); *United States v. Mullen*, 32 F.3d 891, 892-98 (4th Cir. 1994).

C. THE DISTRICT COURT DEPRIVED MOUSSAOUI OF THE RIGHT TO EFFECTIVE SELF-REPRESENTATION IN VIOLATION OF THE SIXTH AMENDMENT.

As noted above, after Moussaoui repeatedly complained about his dissatisfaction with counsel who had been forced upon him, the district court on June 13, 2002, granted him permission to proceed *pro se*, but refused to release defense counsel and instead appointed them as standby counsel. Moussaoui represented himself from that date until the court reappointed counsel on November 14, 2003. Although the court paid lip service to Moussaoui's constitutional right to represent himself, *see Faretta v. California*, 422 U.S. 806 (1975), it undercut that right through orders and procedures that unconstitutionally

interfered with that right. Specifically, Moussaoui was unable to represent himself effectively because the district court permitted standby counsel to speak instead of Moussaoui at critical stages of the proceedings, and permitted the Government to use the SAMs to prevent Moussaoui from getting advice from the legal advisor of his choice. Thus, for almost a year and a half, Moussaoui was in a legal Neverland: not represented by counsel but unable to represent himself effectively.

1. Facts Relating to Denial of the Right of Effective Self-Representation.

At the *Faretta* hearing on June 13, 2002, Moussaoui explained that he was seeking the assistance of a *pro bono* Muslim lawyer for out-of-court advice. JA527. During this hearing, Moussaoui reiterated that his relationship with existing appointed counsel was hopelessly unworkable and that he did not want them involved in the case. JA535 ("I will never share any information, because in fact, I believe that they are working against me."). After the court granted Moussaoui's application to proceed *pro se*, appointed counsel pleaded with the court to find different standby counsel with whom Moussaoui felt more comfortable. JA550-52. The district court rejected this request and ordered appointed counsel to serve as standby counsel until a Muslim attorney could be found. JA553-54.

Briefly during this time, the Government permitted a Texas-based Muslim lawyer named Charles Freeman to meet with Moussaoui on a limited basis. JA716. For months thereafter, Moussaoui sought the assistance of this Muslim

lawyer,[48] but the lawyer ultimately was barred from meeting with Moussaoui because the lawyer refused to undergo the necessary investigation and enter an appearance.

On June 17, 2002, the district court acknowledged the "total break-down of the attorney-client relationship" between Moussaoui and his appointed counsel and relieved MacMahon as counsel for Moussaoui. JA574-75. To replace him, the court appointed Alan H. Yamamoto, Esq., as standby counsel and ordered Freeman to enter an appearance in the case by June 28, 2002. JA575 ("If *pro bono* counsel has not entered his appearance by June 28, 2002, we will appoint a second stand-by attorney to replace the Federal Public Defenders."). [49]

During this period, Moussaoui filed several motions opposing any participation by court-appointed standby counsel and seeking access to and the assistance of Freeman. *See, e.g.*, JA606-08; JA610; JA613; JA614; JA617-22; JA626; JA627-29; JA630-31; JA5857-58; JA5859. In response to a filing by Freeman attempting to clarify his role in Moussaoui's case, JA659-63, the Government declared that only persons who had been approved through a top secret background check could have access to Moussaoui. JA716-17C. Because

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[48] Moussaoui initially would not give Freeman's name, "because of security reason for him, because to defend Moussaoui might be a bit dangerous." JA525.

[49] Less than a month later, the district court concluded that "no attorney appointed by the Court [would] satisfy the defendant," and accordingly reappointed MacMahon as one of Moussaoui's counsel. JA786-77. The court urged Moussaoui to "reconsider his refusal to communicate with these lawyers." JA785-87.

Freeman had not submitted to such an investigation by the Government, he could no longer visit Moussaoui to provide the legal consultation Moussaoui considered critical to his defense. *See* JA716-17C. The district court ultimately held that any lawyer who even consulted with Moussaoui had to enter a formal appearance in the case and undergo a national security background check. JA783-88. Because Freeman had not done so, the district court denied Moussaoui's request that Freeman be permitted to provide Moussaoui with any assistance or advice, whether in or out of court. JA784-85.

Moussaoui complained bitterly that he now found himself with "no access to the outside world, no phone, no letter, no visit, no Freeman." JA1052. Moussaoui continued to request assistance and consultation with Freeman throughout much of the remainder of the proceedings and to protest the participation of standby counsel in his defense.[50]

Moreover, even while Moussaoui was theoretically representing himself, the district court permitted standby counsel – counsel that Moussaoui had not chosen and that were not representing him at the time – to speak for him in a series of

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[50] On July 11, 2002, Moussaoui requested a visit with Freeman to arrange to have him pursue legal courses of action in Europe. JA789-90. On July 15, 2002, Moussaoui again pleaded for "out of grand jury legal assistan[ce]" from Freeman. JA791. Also on July 15, 2002, Moussaoui once again insisted that "Bro. Freeman is my only legal advisor and has total authority for all my out of court interest." JA798. The district court denied each of these requests. *See, e.g.*, JA799-802. Moussaoui specifically highlighted that the SAMs might be used to preclude him from having access to Freeman, JA5857-58; JA5859, who Moussaoui maintained was his "only recognize[d] legal advisor in this case." JA613.

critical pleadings and hearings. Specifically, the district court permitted the Government to provide material, exculpatory evidence and other discovery information only to standby counsel, but not to Moussaoui himself, and held hearings pursuant to CIPA § 6 to determine the admissibility of evidence at which standby counsel, but not Moussaoui himself, appeared and argued. *See, e.g.*, CJA228-29; CJA314-17; CJA322-24; CJA356-58; CJA578-80.

Moussaoui objected repeatedly and bitterly to his exclusion from critical proceedings, in tones that were increasingly suspicious and hostile towards standby counsel. *See, e.g.*, JA1220-24. Moussaoui believed that standby counsel willingly participated in classified hearings to build a case for the court's revocation of Moussaoui's *pro se* status, thus allowing standby counsel to take control of the case. JA1220-24; JA1144-46.

Ultimately, because of the increasingly intemperate nature of Moussaoui's complaints about standby counsel and because he persisted in requesting classified materials even though "[he] had been advised on numerous occasions that he c[ould not] have access to classified material," on November 14, 2003, the court revoked Moussaoui's right to proceed *pro se*.[51] JA1378-80. Relying upon the

[51] To be sure, the tone of Moussaoui's pleadings became increasingly abusive not only to standby counsel, but to the Government and even the district court in the months leading up to the time the district court revoked his *pro se* status. *See, e.g.*, JA1354-55, 1364, 1372, 1374-75. His pleadings also show, however, that Moussaoui expressed increased hostilities as he became more and more convinced that standby counsel, the Government, and the district court were conspiring to deprive him of his right to defend himself. *Id.*

"complexity of the charges . . . , the extensive amount of classified discovery which the defendant is not eligible to review, and the Special Administrative Measures imposed by the Department of Justice," the court reappointed standby counsel as counsel of record. JA785-87; JA1378-80. For the remainder of the proceedings, Moussaoui was represented – against his will – by appointed counsel. He continued to be denied access to discovery – even exculpatory evidence – that had been deemed classified. *See, e.g.*, CJA1615; *see also supra* at 49-78.

2. The District Court's Restrictions on Moussaoui's Ability to Represent Himself Were Unconstitutional.

At the outset of the case, the district court denied Moussaoui a reasonable opportunity to hire his own lawyer, ordered that any lawyer Moussaoui hired would have to be approved by the Government, and barred Moussaoui from freely communicating with the lawyers who had been appointed to represent him. The situation, coupled with the solitary confinement conditions, made Moussaoui distrust the legal system and his lawyers. The district court ultimately granted Moussaoui *pro se* status, but issued a series of orders that essentially deprived Moussaoui of the right to represent himself effectively. Among other things, the district court not only forced Moussaoui to work with standby counsel, but also excluded Moussaoui from the matters to be handled by standby counsel. These orders rendered the process fundamentally unfair, and rendered his subsequent plea involuntary.

A *pro se* defendant does not forfeit his constitutional rights altogether. In order to represent himself effectively, a *pro se* defendant is entitled to: (1) hire at

his own expense legal advisors and investigators, *Torres v. United States*, 140 F.3d 392, 401 (2d Cir. 1998); *United States v. Foster*, 867 F.2d 838, 841 (5th Cir. 1989); (2) run his own defense, *McKaskle v. Wiggins*, 465 U.S. 168, 173-74 (1984); (3) receive exculpatory and other discoverable evidence, *Brady v. Maryland*, 373 U.S. 83, 87 (1963); and (4) conduct a factual investigation, *see McKaskle*, 465 U.S. at 174 (holding that *pro se* defendants have right to control the defense and question witnesses). While these rights are of necessity subject to some restriction in the case of an incarcerated defendant, *see United States v. Peppers*, 302 F.3d 120, 133-34 (3d Cir. 2002) (discussing trial court's recognition that incarceration may inhibit defendant from "contact[ing] or interview[ing] witnesses and prepar[ing] a case"), these restrictions should be no greater than necessary. In this case, however, Moussaoui was needlessly denied each of these rights. As a result, the district court denied him the possibility of representing himself effectively, thus rendering the process fundamentally unfair.

a. The Role the District Court Gave Standby Counsel Violated Moussaoui's Sixth Amendment Rights

Under *Faretta*, a court has discretion to appoint standby counsel to assist a *pro se* defendant if necessary. 422 U.S. at 834 n.46; *see McKaskle*, 465 U.S. at 170. Standby counsel, however, may not usurp control of a *pro se* defendant's case. *McKaskle*, 465 U.S. at 178. In *McKaskle*, the Supreme Court held that excessive participation of standby counsel erodes the defendant's right to represent himself:

> If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant . . . , the *Faretta* right is eroded.

Id. at 178 (emphasis in original).[52]

Where, as here, a *pro se* defendant has been excluded from proceedings relating to the admissibility of evidence at trial, reviewing courts have not hesitated to order new trials. For example, in *United States v. McDermott*, 64 F.3d 1448 (10th Cir. 1995), the defendant sought to represent himself and to retain an attorney as standby counsel. *Id.* at 1451. The district court granted the motion, but ruled that the defendant would not be permitted to participate in bench conferences or other "purely legal matters." *Id.* Instead, the court ordered standby counsel to represent the defendant in these proceedings. *Id.* at 1451-52. On appeal, the Tenth Circuit found that the defendant's exclusion from bench conferences, some of which covered the admissibility of evidence and other evidentiary issues, violated the Sixth Amendment under *McKaskle*. *Id.* at 1454 (citing *McKaskle*, 465 U.S. at 178).

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[52] The Court also held that "participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." *McKaskle*, 465 U.S. at 178. This prong of *McKaskle* is not relevant here because Moussaoui's *pro se* representation ended before jury proceedings commenced. *See id.* at 179 ("Participation by standby counsel outside the presence of the jury engages only the first of these two limitations.").

Similarly, in *Oses v. Massachusetts*, 961 F.2d 985 (1st Cir. 1992), the First Circuit held that a defendant's exclusion from a series of bench conferences attended by standby counsel violated the Sixth Amendment and constituted structural error. *Id.* at 986. The conferences involved, among other things, "evidentiary matters, availability of witnesses, security measures, and even the ability of the defendants properly to present their defense." *Id.* The Court affirmed the district court's holding, *id.* at 987, which stated that the state judge's unilateral decision to conduct these conferences outside the defendant's presence "violated the petitioner's [S]ixth [A]mendment right to retain actual control over his defense." *Oses v. Massachusetts*, 775 F. Supp. 443, 458 n.21 (D. Mass. 1991).

The proceedings during the period that Moussaoui was representing himself violated the principle set forth in *McKaskle* in several respects. ***First***, the district court repeatedly ordered production of discoverable and exculpatory material to standby counsel *but not Moussaoui* with the instruction that standby counsel, and not Moussaoui, would brief and argue the admissibility of this information. This procedure clearly permitted standby counsel to "make or substantially interfere with . . . significant tactical decisions." *McKaskle*, 465 U.S. at 178. From June 14, 2002, when Moussaoui was permitted to proceed *pro se*, JA571-73, until counsel were reappointed on November 14, 2003, JA1379, the Government[53]

[53] Moussaoui, *pro se*, had requested access to a number of witnesses that the district court later determined were material witnesses. When the district court ultimately considered access, and when the Government later produced this information, Moussaoui was excluded from those proceedings entirely. The district court produced written substitutes. *See* JA5882-86 (seeking access to [redacted]

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produced significant quantities of material, exculpatory and/or discoverable information to standby counsel, *see supra* 66-78. But under the Protective Order entered by the Court, Moussaoui did not receive any of it. JA92-108.

Once again, CIPA provided the appropriate solution, one that the district court did not follow. Under CIPA § 4 and § 6, the Government should have been required either (1) to produce material directly to Moussaoui, (2) to present unclassified or redacted substitutes to the district court *ex parte* for approval to produce them to Moussaoui, (3) to stipulate to an adverse finding of fact, (4) or to dismiss the case. *See supra* at 39-40. Instead, Moussaoui was unable to see critical evidence, assist in interpreting it, or aid in the factual development of the case. This was clearly structural error.

Second, the district court held a number of CIPA hearings, at which the parties discussed the admissibility of classified evidence. The district court permitted standby counsel to speak instead of Moussaoui, who was not even

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[redacted] as a "circumstantial witness"); JA1134 (seeking to call [redacted] "to the open court" as an exculpatory witness); JA6045-48 (seeking access to Zubaydah [redacted] to obtain exculpatory evidence); JA6082-85 (seeking access to Zubaydah, [redacted] for purposes of exculpatory evidence); JA6088-93 (seeking access to [redacted] JA6094-97 (seeking access to [redacted] as an exculpatory witness and outlining his potential trial testimony); JA6098-6103 (seeking access [redacted] to obtain purported exculpatory statements); JA6124-31 (seeking access to [redacted] light of Government's changing theory of the case); JA6132-37(seeking exculpatory statements made by [redacted]; JA6175-78 (seeking access to potentially exculpatory statements by various Detainees); JA6285-88 (seeking access to [redacted]

permitted to attend. On August 23, 2002, the district court categorically barred Moussaoui from proceedings dealing with classified materials because he did not have a security clearance as required by the Protective Order. JA1124-26. In so doing, the district court charged standby counsel with making all tactical and strategic decisions for Moussaoui with respect to classified evidence. For example, standby counsel filed a number of CIPA § 5 designations without Moussaoui's participation. *See, e.g.*, CJA70-9; CJA102-8; CJA167-69; CJA214-15. Pursuant to CIPA § 5, the defense was required to give notice to the Government of the classified evidence that it "reasonably expect[ed] to disclose or to cause the disclosure of . . . in any manner in connection with any trial." 18 U.S.C. App. III § 5(a). Here, however, as a result of the district court's order, this process did not include Moussaoui – who was representing himself and was entitled to material for his defense. Rather, standby counsel – not Moussaoui – made all tactical and strategic decisions regarding what classified evidence the defense ***expected to disclose or cause to be disclosed at trial.***[54]

Third, standby counsel – and only standby counsel – represented Moussaoui at a number of CIPA § 6 hearings, notwithstanding that Moussaoui was *pro se* at the time. *See, e.g.*, CJA228-29; CJA314-17; CJA322-24; CJA356-58; CJA578-80. As explained above, CIPA § 6 required the Court to hold hearings upon request of the Government to determine prior to trial the "use, relevance, or admissibility" of

[54] Moussaoui protested the fact that these proceedings were being conducted under seal and on a classified basis. *See, e.g.*, CJA316.

the classified information listed in the defense's CIPA § 5 notices. 18 U.S.C. App. III § 6(a). Because of the district court's order barring Moussaoui from these proceedings, standby counsel, not Moussaoui, spoke for the defense. *See* JA1125 ("Moussaoui's Fifth and Sixth Amendment rights are adequately protected by standby counsel's review of the classified discovery and their participation in any proceedings held pursuant to [CIPA] even though the defendant will be excluded from these proceedings.").

In sum, the district court's August 23, 2002, order held that "the United States' interest in protecting its national security information outweighs the defendant's ***desire*** to review the classified discovery." JA1125 (emphasis added). This rationale turns the *McKaskle* analysis on its head. Moussaoui had more than just a "desire to review the classified discovery" at stake here – he had a right to control the tactical and strategic decisions affecting his defense. *McKaskle*, 465 U.S. at 178. It is the Government's "interest" that must give way in the balance. *Cf.* 18 U.S.C. App. III § 6(e) (governmental refusal to produce classified evidence deemed required by court could result in dismissal of indictment); *see also United States v. Smith*, 780 F.2d 1102, 1105-06 (4th Cir. 1985) (similar).

Moreover, the district court's conclusion that "Moussaoui's Fifth and Sixth Amendment rights [were] adequately protected by standby counsel's review of the classified discovery and their participation in any proceedings held pursuant to [CIPA], ***even though the defendant will be excluded from these proceedings***," JA1125 (emphasis added), ignores the *McKaskle* test and miscomprehends the

nature of the *pro se* right. It simply makes no sense to say that standby counsel's participation in proceedings from which a *pro se* defendant is excluded "adequately protects" the defendant's Sixth Amendment right to represent *himself*. *See McKaskle*, 465 U.S. at 177 n.8 ("The right [to self-representation] is either respected or denied; its deprivation cannot be harmless.").

The district court appears to have concluded that a "defendant's *pro se* status is not undermined by standby counsel's participation in pretrial matters." JA1129 (citing *McKaskle*). The test in *McKaskle*, however, is not whether the proceedings occur at trial or in pretrial, but whether the defendant preserves "***actual control*** over the case he chooses to present to the jury." *McKaskle*, 465 U.S. at 178 (emphasis added). Standby counsel were charged with making tactical and strategic decisions in CIPA proceedings, including decisions relating to the evidence admissible at trial and, therefore, necessarily had "actual control" over the case that will be presented to the jury. The court's preclusion of Moussaoui's participation in the CIPA framework for determining the substance and admissibility of classified evidence and its authorization of standby counsel's participation to speak in his place, amount to an undeniable violation of Moussaoui's right to represent himself under *McKaskle*.

b. While Moussaoui Represented Himself, the District Court Restricted His Ability to Receive Evidence and to Communicate with His Standby Counsel.

During the entire period Moussaoui represented himself, the Protective Order prevented Moussaoui from receiving critical evidence and prevented him from discussing this evidence with his standby counsel. This was unconstitutional.

c. The Special Administrative Measures Deprived Moussaoui of His Right to Effective Self-Representation.

While Moussaoui was representing himself, he also was subject to the SAMs. We do not contend that the SAMs at issue were unconstitutional on their face; rather, the manner in which those SAMs were applied in this case deprived Moussaoui of any ability to defend himself effectively. Specifically, the Government and the district court used the SAMs to deny Moussaoui access to Freeman. As noted above, Freeman, who was barred by the state of Texas, offered to advise Moussaoui on a *pro bono* basis. JA659-60.

Even though the Government permitted Moussaoui to meet with Freeman initially, it later insisted that Freeman undergo a full national security background check under the SAMs in order to continue meeting with and advising Moussaoui. *See* JA632 (stating "even if Mr. Freeman does move to enter this case, he will still need to pass a FBI background check before his representation of defendant"); JA717 (stating in regards to Freeman that "to the extent such an attorney consents to a standard background investigation and after such an inquiry is properly cleared to review the discovery materials in this case, including classified documents, such an attorney could serve in any capacity the *pro se* defendant wishes"). When

Freeman did not do so, the Government used the SAMs to cut-off all discussions between Moussaoui and Freeman.[55]

This Court has endorsed *pro se* representation with the aid of a legal advisor. *See United States v. Singleton*, 107 F.3d 1091, 1103 n.10 (4th Cir. 1997) (recognizing that a *pro se* "defendant who validly asserted his *Faretta* right could hire an attorney to serve as a legal expert consultant, *in a nonparticipatory role*"). However, as set forth above, Moussaoui was soon deprived of his attorney advisor as well.

There is absolutely no reason that a defendant under these circumstances should be prohibited from *consulting* with a lawyer who is willing to donate his time. *In re Moussaoui*, 41 Fed. Appx. 686, 686 (4th Cir. 2002) ("Failure to be admitted *pro hac vice*, in and of itself, is insufficient to deny an accused access to meet with an attorney . . . .) (Gregory, J., concurring in part and dissenting in

[55] Moussaoui also sought access to legal advisors, private investigators, and official representatives of foreign governments. *See* JA1052-53; JA720-22 (seeking to contact European Government entities); JA723-26 (seeking to contact the European Court of Justice, or an attorney practicing before the ECJ, in order to obtain evidence from European countries); JA739 (complaining that "at the moment I have nobody to investigate the case for me outside"); JA793 (seeking as a French citizen to contact the French Embassy and the French National Assembly). However, Moussaoui was consistently denied access to any third parties by the Government, due to the SAMs restrictions imposed upon him.

part).[56] The district court's denial of Moussaoui's access to Freeman further exacerbated the initial denial of choice of counsel. JA783-88.[57]

The use of the SAMs in this manner was clearly unconstitutional and unnecessary. The Government and the district court had no suspicions whatsoever that Freeman was advancing any terrorist interest – Freeman was a well established criminal defense lawyer from Texas. Nonetheless, when Freeman refused to undergo the background check, the district court cut off Moussaoui's ability to confer with him as a legal advisor. This use of the SAMs was unconstitutional.

This was not a case in which a *pro se* pretrial detainee merely had a more difficult time preparing his defense than would be the case if he were relying on counsel or was out on bond. In such cases, a *pro se* defendant can still communicate with friends and family, hire an investigator, and even solicit information himself from third parties. Here, it was ***impossible*** for the defendant to prepare his defense. Moussaoui was locked in isolation and barred from any communication with his chosen legal advisor for no reason whatsoever.

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[56] This opinion merely denied mandamus review and did not reach the merits.

[57] The district court denied Moussaoui's request that Freeman provide Moussaoui with any assistance or advice, on the basis that, among other things, Freeman had violated a local rule by not entering a formal appearance. JA784-85. As explained above, the district court repeated at the April 22, 2002, and June 13, 2002, hearings that any standby counsel retained by Moussaoui that would appear *in court* would have to enter an appearance and obtain a national security clearance. JA246, 258; JA534-35.

Thus, the district court, while ostensibly granting Moussaoui the right to represent himself, denied him the possibility of doing so effectively. As a result, just as in *Hernandez*, 203 F.3d at 626-27, Moussaoui was faced with an unconstitutional choice: a fundamentally unfair trial at which he would be denied his *Faretta* rights, or a guilty plea. The Supreme Court has stated that "[s]ince the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." *McKaskle*, 465 U.S. at 177 n.8. The district court's orders effectively made Moussaoui choose between pleading guilty on one hand, and, on the other, participating in a trial at which he would be largely uninformed and uninvolved. This rendered his plea involuntary.

D. THE DISTRICT COURT VIOLATED THE FIFTH AND SIXTH AMENDMENTS WHEN IT DENIED MOUSSAOUI THE RIGHT TO BE PRESENT DURING CRITICAL STAGE PROCEEDINGS.

The district court barred Moussaoui from any participation in the CIPA § 5 and § 6 proceedings – proceedings that sought to determine the admissibility of evidence at trial. Barring Moussaoui from these proceedings was no different than barring him from the trial itself. This was another clear error that went to the fundamental fairness of the trial and rendered Moussaoui's plea involuntary. *See supra* at 19-25.

"The Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment together guarantee a defendant charged with a

felony the right to be present at all critical stages of his trial." *United States v. Rolle*, 204 F.3d 133, 136 (4th Cir. 2000); *see also Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."); *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.").

Courts generally hold that proceedings relating to admissibility of evidence are critical stages at which the defendant must be present. *See United States v. Hamilton*, 391 F.3d 1066, 1070 (9th Cir. 2004) ("[A] pretrial motion to suppress evidence is a critical stage of the prosecution . . . because in many cases the crucial issue is the admissibility of evidence found in the defendant's possession." (citations omitted)); *United States v. Hodge*, 19 F.3d 51, 53 (D.C. Cir. 1994) ("[A] suppression hearing is a 'critical stage of the prosecution' affecting substantial rights of an accused." (citation omitted)); *Hanson v. Passer*, 13 F.3d 275, 278 (8th Cir. 1994) ("omnibus hearing" under state law during which several motions, including "motion to determine the admissibility" of evidence, constituted "critical stage"); *cf. Wilson v. Murray*, 806 F.2d 1232, 1238 (4th Cir. 1986) (admissible statement elicited in absence of counsel violated defendant's right to counsel at "critical stage"). A defendant's exclusion from such proceedings is considered fundamentally unfair because "the defendant's presence at the proceeding would

have contributed to the defendant's opportunity to defend himself against the charges." *Stincer*, 482 U.S. at 744 n.17.

Of course, a trial court ordinarily rules on the admissibility of evidence at trial. As discussed previously, CIPA § 5 requires the defense to give pretrial notice to the Government of the classified evidence that it "reasonably expect[s] to disclose or to cause the disclosure of" at trial, 18 U.S.C. App. III § 5(a), and hearings pursuant to CIPA § 6 determine "use, relevance, or admissibility" at trial of the classified information listed in the defense's CIPA § 5 notices, *id.* § 6(a). Moreover, this Court has recognized that CIPA constitutes proceedings to "determine the 'use, relevance, or admissibility of classified information ***that would otherwise be made during the trial*** . . . .'" *Smith*, 780 F.2d at 1105 (quoting 18 U.S.C. App. III § 6) (emphasis added). In essence, therefore, CIPA § 5 and § 6 proceedings actually are slices of the trial transferred into the pretrial period for the convenience of the Government in order to safeguard classified information. As this Court also has recognized, Congress did not intend CIPA to affect normal trial rights and procedures. *See id.* at 1109 ("Had CIPA not been enacted, the Government could have raised its privilege at trial. The trial court then should have engaged in the balancing test of *Roviaro* [*v. United States*, 353 U.S. 53 (1957)]. If it determined that the Government's interest was superior, . . . the evidence would not be disclosed. That is yet the law, but CIPA dictates that such a decision be made prior to trial."). Under these circumstances, there can be little

doubt that the CIPA § 5 and § 6 proceedings were critical stages that Moussaoui had a right to attend. *See Hodge*, 19 F.3d at 53; *Hanson*, 13 F.3d at 278.

Between June 2002 and November 2003, the district court held at least five "CIPA hearings" constituting critical stages of the trial that Moussaoui was barred from attending. *See* CJA228-29; CJA314-17; CJA322-24; CJA356-58; CJA578-80. As standby counsel explained a number of times (both as standby counsel and as counsel of record), they had the very difficult task of wading through the volumes of classified evidence that involved a language and culture foreign to them. *See, e.g.*, JA1082D-F. Although it is virtually certain that Moussaoui could have assisted them in identifying key individuals, events, and places throughout this process, the Court "can only speculate as to what suggestions [Moussaoui] might or might not have made" to his counsel in this process. *United States v. Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968).

By the time of Moussaoui's plea, the district court had made it clear that he would not be permitted to attend any of these critical stage proceedings. *See, e.g.*, CJA228-29 ("I scheduled this hearing under the CIPA statute. Therefore, Mr. Moussaoui cannot be present, because he doesn't have the necessary clearances."). Moussaoui thus understood that he was going to be excluded from the "entire process." *United States v. Tipton*, 90 F.3d 861, 875 (4th Cir. 1996) (recognizing that exclusion from entire process results in presumption of prejudice). Moussaoui was thus forced to choose between a fundamentally defective process – one in which he would be tried without attending any critical hearings or reviewing any

filings relating to the most material and exculpatory information in his case – and pleading guilty. This rendered Moussaoui's plea involuntary. *See Hernandez*, 203 F.3d at 627; *Mullen*, 32 F.3d at 892-98; *Larson v. Tansy*, 911 F.2d 392, 395 (10th Cir. 1990) (holding that prejudice is presumed where defendant excluded from process and where a "defendant's presence might have allowed him to provide assistance to his counsel"); *Crutcher*, 405 F.2d at 244 (presuming prejudice where defendant absent throughout entire critical stage proceeding because he may have been of assistance to counsel).

E. THE DISTRICT COURT DENIED MOUSSAOUI PERSONAL ACCESS TO EXCULPATORY INFORMATION AND DISCOVERY IN VIOLATION OF *BRADY V. MARYLAND* AND THE FIFTH AMENDMENT.

This appeal presents a unique question, but one with a clear answer: Can the Government discharge its *Brady* and other disclosure obligations[58] by producing documents to defense counsel with restrictions that the material cannot be shared or discussed with the defendant? The answer is plainly "no." A defendant who does not personally have access to *Brady* and other evidence cannot knowingly make important decisions in his case. If the defendant pleads guilty without

[58] Among other things, the Government had Rule 16 and *Brady* obligations. It also bears noting that the summaries produced to defense counsel were intended to be a substitute for actual access to the witnesses; as such, the process here was *sui generis* and resulted in discovery obligations for the Government that included, but were broader than other typical disclosure obligations. *See Moussaoui II*, 382 F.3d at 477 (noting that the purpose of the substitution was to put Moussaoui "in the position he would be in if the classified information (here the depositions of the witnesses) were available to him"); *id.* at 482.

knowledge of material, exculpatory evidence, the ensuing conviction violates the Due Process Clause. This does not change when the defendant pleads guilty while defense counsel knows of the exculpatory evidence but is forced to withhold it from the defendant.

It is well established that a prosecutor has an "affirmative duty to disclose evidence favorable to a defendant." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). Failure to disclose favorable evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "Material" in this context means "there is a reasonable probability that, had the evidence been disclosed . . . , the result of the proceeding would have been different." *See United States v. Bagley*, 473 U.S. 667, 682 (1985). The judgment of materiality must be made by viewing all withheld evidence "collectively" rather than "item by item." *Kyles*, 514 U.S. at 436.

We have not found any case even considering this specific issue: whether *Brady* and other disclosure obligations are satisfied by production to defense counsel without permission or ability to share those materials with the defendant. However, basic principles dictate that this crafty solution to the complexities associated with classified discovery does not work.

To explain, the law is clear that the decision whether or not to plead guilty "belongs to the defendant, not to counsel." *Miller v. Angliker*, 848 F.2d 1312, 1322 (2d Cir. 1988); *see also Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[T]he

accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." (internal citations omitted)); *United States v. Ortiz*, 82 F.3d 1066, 1070-71 (D.C. Cir. 1996) (explaining that the decisions "to plead guilty, forego a jury trial, or forego the assistance of counsel" are waivers of "fundamental and personal constitutional rights that may only be knowingly and intelligently" made). *Brady* information is, by definition, material to that decision. *See Bagley*, 473 U.S. at 682-83. Indeed, the strength of the prosecution's case is one of the most important factors in a defendant's decision to plead guilty or to contest the charges. *See, e.g.*, *Brady v. United States*, 397 U.S. 742, 756 (1970) ("*Robert M. Brady*") ("Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him . . . .").

The inevitable conclusion from these principles is that *Brady* and other disclosure obligations cannot be satisfied by producing information to defense counsel and then barring defense counsel from sharing the information with the defendant. The defendant cannot assess his own case, cannot assist his counsel with the evidence or the witnesses, cannot help identify other leads for discovery and investigation, cannot make other critical decisions and – most important for present purposes – cannot enter a knowing guilty plea. Production of *Brady* material to be kept secret from the defendant simply does not satisfy the Constitution.

As a result of this critical error, Moussaoui was left to choose between proceeding with a fundamentally unfair trial – without personal access to discovery – and pleading guilty. This choice rendered his subsequent plea involuntary.

F. DENIAL OF MOUSSAOUI'S SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS RENDERED HIS PLEA INVOLUNTARY.

We have set forth above, *supra* at 59, the procedural history relating to Moussaoui's attempts to get access to certain enemy combatant witnesses. *See also Moussaoui II*, 382 F.3d at 457-60. On October 14, 2004, the court denied Moussaoui's petition for rehearing and rehearing *en banc*. JA1407. The Supreme Court denied Moussaoui's petition for a writ of certiorari on March 21, 2005. *Moussaoui v. United States*, 544 U.S. 931 (2005). After Moussaoui's plea in April 2005, defense counsel, on May 17, 2005, filed a motion requesting access to certain witnesses prior to the penalty trial. CJA1392. On June 10, 2005, in light of this Court's earlier ruling, the district court denied the motion for pretrial access. CJA1450.

The denial of Moussaoui's right to compulsory process violated the Sixth Amendment and left Moussaoui to choose between an unfair trial and pleading guilty. However, understanding that this panel of this Court is bound by its previous decisions, *Moussaoui II*, 382 F.3d at 453, we reserve this argument for later review.

As this Court is aware, by letter dated October 25, 2007, and in letters and filings thereafter,[59] the Government disclosed that sworn declarations by the CIA and representations by counsel for the United States – filed or made to both this Court and the district court in the context of deciding this issue – were incorrect. Contrary to those declarations and representations, the Government has possessed, for several years, at least some videotapes or audiotapes of the interrogations of al Qaeda operatives and has destroyed some of those tapes. To date, the Government has disclosed that the interrogations of [redacted] critical witnesses were taped – [redacted] each of whom was found by the district court to be a material witness in this case, as well as Abu Zubaydah, who was not. As the Court also knows, it has now come to light that the Government destroyed the

[59] As this Panel is aware, Moussaoui moved for a limited remand of this appeal to consider facts and issues relating to the existence and destruction of Detainee recordings. We incorporate by reference Moussaoui's filings on that issue as if fully stated herein. On January 16, 2008, this Panel denied without prejudice a motion for temporary remand; as a result, Moussaoui is permitted to raise herein these issues for the Panel's consideration. We cite below a number of the motion for remand filings as follows: (1) October 25, 2007 letter from Government to this Court ("Oct. 25 Letter") (JA5629A-29E); (2) Appellant's Contested Motion for Limited Remand ("Remand Motion") (Dkt. 107); (3) Appellee's Response in Opposition to Contested Motion for Limited Remand ("Government's Opposition") (Dkt. 110); (4) Appellant's Reply in Support of Contested Motion for Limited Remand ("Remand Reply") (Dkt. 117); (5) December 18, 2007 letter from Government to this Court ("Dec. 18 Letter") (no docketed in this Court); (6) Appellant's Supplemental Memorandum in Support of Contested Motion for Limited Remand ("Supplemental Memo.") (Dkt. 119); and (7) Appellee's Supplemental Response to Appellant's Contested Motion for Limited Remand ("Government's Supplemental Response") (Dkt. 118).

recordings of Zubaydah and has not located at least one of the tapes of [redacted] These revelations require a remand for three reasons.

First, the absence of videotapes and audiotapes of the interrogations affected the knowing and voluntary nature of Moussaoui's plea. At the time Moussaoui entered the plea, there was no objective evidence to prove the reliability of the written substitutes, and there was – based on the absence of tapes – no way for Moussaoui to test or challenge any conclusions about reliability. These issues were at the forefront of Moussaoui's mind when he entered his plea, as is obvious from even the transcript of the plea hearing. Ex. I to Remand Motion (stating that the guilty plea and continued opposition to the substitutions are meant to "preserve [his] chance in front of the Supreme Court to . . . raise the issue of substitution and to raise the issue of fair trial"). In this context, the district court should be permitted to determine whether the incorrect declarations and representations affected the knowing and voluntary nature of Moussaoui's plea.

Second, this Court held in *Moussaoui II* that Moussaoui had a Sixth Amendment right to access to the witnesses at issue but that written summaries could be an adequate substitute for actual access. *Moussaoui II*, 382 F.3d at 456. A critical underpinning of this Court's ruling was its finding that the Government had an incentive to obtain truthful, reliable statements during interrogations, and that written summaries produced as a result of those interrogations could therefore be reliable substitutes for access to the witnesses or even for live or videotaped testimony. *Id.* at 478. As set forth below, this Court and the district court

specifically asked the Government whether there were tapes – either audio or video – of the "raw interviews" that could be compared to the written summaries so that there could be a finding of reliability or unreliability.

For example, as early as May 7, 2003, the district court expressed concern about whether the substitution process suggested by the Government was going to produce reliable evidence. In the course of that discussion, the district court repeatedly requested that the Government provide information about potential electronic recordings of detainee interrogations in order to permit the court to determine the reliability of the substitutions. CJA588, 618. The implication was that if the district court, or someone else, could compare the raw footage of interrogations with the intelligence summaries, even if only on a sampled basis, there would be some evidence in the record about the reliability of the intelligence summaries. CJA589 (noting that it's "important for the Court to know . . . how the questions and answers are being memorialized" because of the issue relating to the "accuracy of even the statements that we're working off of in the substitution."); CJA598A (noting a "huge difference" between comparing a substitute to the original versus comparing a substitute to an interrogator's summary); *see also* U.S. Brief in Opposition to Defendant's Petition for Writ of *Certiorari,* at p. 7 n.3 (noting that the district court compared the Government's proposed substitutions with the intelligence summaries for accuracy and to make sure the Government had not omitted relevant information). Two days later, the Government provided an *ex parte* declaration to the district court seeking to address the court's concerns

("May 9 Declaration"). *See* Ex. D to Remand Motion. In response to the court's inquiry as to "whether the interrogations of [redacted] are being recorded in any format," the Government's response was simple and concise: "no." *Id.*

In addition, this Court repeatedly questioned the Government about the existence of recordings in order to ensure the reliability of the summaries. For example, Judge Wilkins noted during oral argument that [redacted]

[redacted]

Third, once this Court determined that substitutions for the detainee testimony could be crafted, the district court relied on the Government's

representations about the recordings in making its determinations about the reliability of proposed substitutions. The district court demanded that the Government "do the equivalent of an all agencies check," requiring statements under penalty of perjury from the CIA, the FBI, the Department of Defense, and the NSA that "there have not been any video or audio recordings made of the interrogation of these witnesses by any United States or other governmental agencies during this process." CJA1367-69. As this Court is aware, the Government ultimately confirmed that it did not have any videotapes of the interrogations of [redacted] or others, *see* Ex. D to Remand Motion, and on the basis of that representation, the district court found the substitutions to be adequate. CJA1927-28. Having relied on the Government's inaccurate representations, the district court should now be permitted to determine whether its conclusions have been undermined by the recent disclosures.

In short, a great deal of what occurred prior to the plea depended on the government's inaccurate representations about the taping of witness interrogations. These inaccuracies relate directly to the voluntary and knowing nature of Moussaoui's plea because they concern the reliability of substituted evidence in this case. As set forth in the motion to remand and additional filings, findings of fact and entry of conclusions thereon are necessary before this Court can review the consequences of the inaccurate representations. This Court should accordingly remand.

G. THE FIFTH AND SIXTH AMENDMENT VIOLATIONS FORCED MOUSSAOUI TO CHOOSE BETWEEN A FUNDAMENTALLY UNFAIR, UNCOUNSELLED TRIAL AND PLEADING GUILTY, AND HIS PLEA WAS ACCORDINGLY INVOLUNTARY.

Taken together, these errors resulted in an almost unprecedented abridgement of Moussaoui's Fifth and Sixth Amendment rights. For months after his arrest, Moussaoui was given no opportunity to hire his own lawyer. When he finally was informed of his right to retain his own lawyer, he was told that he could only retain counsel approved by the Government after a national security investigation. The court limited counsel's communication with Moussaoui due to an incorrect application of CIPA. Over time, Moussaoui's relationship with counsel broke down. Rather than proceed with counsel he did not want and whom he felt were in league with the Government, Moussaoui sought to represent himself. While the court permitted him to do so, it forced him to accept counsel he despised as standby counsel, continued to bar him from seeking advice from counsel of his choice, excluded him from critical stages of the proceedings, prevented him from seeing exculpatory and other discovery, and prevented him from communicating at all with the outside world. The court ultimately revoked his right to proceed *pro se*, reimposed counsel whom Moussaoui had rejected, but continued to limit his communication with counsel and his access to evidence and material witnesses.

The district court's patently unconstitutional rulings were undoubtedly motivated by the Government's invocations of national security. But, as discussed above, the course the court permitted the Government to follow – asserting

national security interests to claim veto rights over Moussaoui's choice of counsel, communications with counsel, and access to information – is neither required nor authorized by CIPA, and is contrary to the Fifth and Sixth Amendments. Thus, the district court's efforts to accommodate the Government's national security interests resulted in a fundamentally unfair proceeding. Indeed, these errors are of the sort which the courts have characterized as "structural," in that they "transcend[] the criminal process" by depriving a defendant of those "basic protections" without which "no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminante*, 499 U.S. 279, 310-11 (1991).

Errors of this sort invariably require reversal of a conviction, without regard to harmless error analysis. Because these errors strike at the very framework of criminal proceedings, their effects are difficult or impossible to assess and quantify. *See Gonzalez-Lopez*, 126 S. Ct. at 2564; *United States v. Curbelo*, 343 F.3d 273, 278 (4th Cir. 2003) ("[S]tructural defects in the constitution of the trial mechanism [,] defy analysis by 'harmless-error' standards, because they are necessarily unquantifiable and indeterminate." (internal quotation marks, alteration omitted)); *see also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (explaining that structural errors "will always invalidate the conviction"); *Arnold v. Evatt*, 113 F.3d 1352, 1360 (4th Cir. 1997) ("[T]he Supreme Court has established a distinction between structural errors, which require automatic reversal, and all other errors, which are subject to harmless-error analysis."); *United States v. Cobb*, 905 F.2d 784, 791 (4th Cir. 1990) (holding that denial of the right to consult with attorney

was "*per se* reversible error"). This Court has expressed "difficulty imagining a structural defect that does not seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Floresca,* 38 F.3d 706, 712 (4th Cir. 1994) (citing *United States v. Olano,* 507 U.S. 725, 736-37 (1993)).

As discussed supra at 19-25, these errors render Moussaoui's plea involuntary. The errors deprived Moussaoui of the free choice between a trial and a waiver of his trial rights that is the essence of voluntariness. *Hernandez*, 203 F.3d at 626-27 (vacating conviction on guilty plea due to erroneous denial of defendant's *Faretta* motion); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004) (noting that error was not structural but suggesting it could invalidate a plea if it were). Rather than the choice commanded by the Constitution – between a trial at which his constitutional rights would be honored and a waiver of those rights – Moussaoui was faced with the choice between a guilty plea and a trial infected by the pervasive deprivation of his Fifth and Sixth Amendment rights.

"Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting). This case is surely a "great" one within the meaning of Justice Holmes's famous dictum. The awful events of September 11, 2001, have scarred our national psyche like nothing since Pearl

Harbor. It is inconceivable that in any other case, our courts would tolerate the wholesale deprivation of constitutional rights suffered by Moussaoui in this case. But the precedent set by this case would be a dangerous one, for if a defendant's right to counsel can be trampled upon in the interest of national security, what other Government objectives could serve as well?

Faced with either a trial that could possibly lead to his execution under these conditions – no access to material witnesses, forced counsel, restrictions on communication with counsel, no personal access to *Brady* and other discovery, barred from critical stage hearings – or a guilty plea, Moussaoui chose to plead guilty. This plea was simply not voluntary, and this Court should accordingly vacate it.

II. THIS COURT SHOULD VACATE MOUSSAOUI'S PLEA BECAUSE IT WAS UNKNOWING, UNCOUNSELLED, AND TAKEN IN VIOLATION OF RULE 11.

"[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). A guilty plea "'cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.'" *United States v. Broce*, 488 U.S. 563, 570 (1989) (quoting *McCarthy*, 394 U.S. at 466); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (same).

In this case, the district court's acceptance of Moussaoui's plea was similarly improper because the plea was not counseled and not knowing. Because he did not personally have access to certain critical, exculpatory information,

Moussaoui's plea was not knowing. Similarly, at the time of the plea, his lawyers were prohibited from discussing with him material, exculpatory evidence, and as a result, his plea was no different from other "uncounselled" pleas that courts have invalidated. *See, e.g.*, *Childress v. Johnson*, 103 F.3d 1221, 1231 (5th Cir. 1997) (ordering habeas relief where defendant "was constructively denied his constitutional right to the assistance of counsel" at guilty plea hearing because appointed counsel functioned as "the equivalent of standby counsel" under state law).

In addition, the court committed several critical errors in accepting the plea that, individually and collectively, require this Court to vacate the conviction and remand the case. ***First***, the district court failed to ensure that Moussaoui understood the "nature" of the charged conspiracy and, in particular, that it encompassed the September 11th attack. Indeed, Moussaoui's admissions and denials during the plea hearing clearly showed that Moussaoui misunderstood the nature of the charges. *See infra* 135-152. ***Second***, the district court took the plea in violation of the requirement that there be a factual basis for finding that every element of the alleged crime is established. ***Finally***, the district court never held a competency hearing, despite reasonable cause to do so.

A. MOUSSAOUI'S PLEA WAS UNKNOWING AND UNCOUNSELLED.

1. Moussaoui Did Not Personally Have Access to Exculpatory Information that Had Been Produced Prior to His Plea.

As set forth above, the district court barred Moussaoui from seeing or discussing with his counsel certain exculpatory evidence if that evidence was classified. Thus, when he pled guilty, his counsel possessed critically important, clearly exculpatory evidence unknown to Moussaoui.

The prosecution's failure to disclose exculpatory evidence to the defendant renders a defendant's subsequent guilty plea invalid. *See McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) ("[I]t is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant Government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea."); *United States v. Wright*, 43 F.3d 491, 496 (10th Cir. 1994) (explaining that "the prosecution's violation of *Brady* can render a defendant's plea involuntary"); *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988) (holding that "even a guilty plea that was [otherwise] 'knowing' and 'voluntary' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution"); *Banks v. United States*, 920 F. Supp. 688, 692 (E.D. Va. 1996) (vacating conviction due to pre-plea *Brady* violation).[60]

[60] *See also United States v. McCleary*, No. 95-6922, 1997 WL 215525, at *3 (4th Cir. May 1, 1997) ("Several circuits have held that a guilty plea may be deemed involuntary if entered into in the absence of withheld *Brady* evidence."); *Dufour v.*

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The Second Circuit's decision in *Tate v. Wood*, 963 F.2d 20 (2d Cir. 1992), is illustrative. In that case, the *pro se* defendant, charged with second degree murder, made a request, through standby counsel, for *Brady* material. *Id.* at 24. The prosecution produced none. *Id.* The defendant then accepted a plea bargain and pled guilty, after a full colloquy, to the lesser charge of manslaughter. *Id.* "[I]mmediately after the plea was entered," however, the prosecutor told a local newspaper that his office had accepted the lesser charge because of "information from their investigation" indicating that the victim "may . . . have been the aggressor." *Id.* After the defendant exhausted his state remedies, the federal *habeas* court denied him an evidentiary hearing to test these allegations. The Second Circuit reversed, holding that, even after his plea, "in view of the newspaper account, petitioner may have a valid *Brady* claim." *Id.* at 25. It remanded for the district court to determine "whether there [wa]s a reasonable probability that but for the failure to produce" the withheld evidence, "the defendant would not have entered the plea." *Id.* at 24.

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Keyser, No. 91-7015, 1993 WL 261985, at *1 (4th Cir. Jul. 9, 1993) ("To determine whether the withheld evidence was material the Court must decide whether there is a reasonable probability that, had the evidence been disclosed to the defense, [the defendant] would not have pled guilty and would have insisted on going to trial."); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (reasoning that *Brady* claims survive the plea because otherwise "prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas").

Similarly, in *Banks*, the defendant, charged with two drug counts, asked for and was promised by the prosecution all *Brady* material in the prosecution's possession. 920 F. Supp. at 690. After pleading guilty, the defendant learned that the federal law enforcement personnel had permitted the chief prosecution witness to receive conjugal visits in prison. *Id.* Upon learning this information, the defendant filed for federal *habeas* relief, and the court granted the writ. The court agreed with defense counsel that "knowledge of the conjugal visits would have been significant in evaluating the strength of the government's case" and, consequently, the decision of whether or not to plead guilty. *Id.* at 693.

Likewise, a defendant has the constitutional right to have his counsel's assistance in determining whether to plead guilty to the charges against him. *See, e.g., McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (right to effective assistance of counsel at plea proceedings); *Hamilton*, 368 U.S. at 55 ("When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted."); *see also Banks*, 920 F. Supp. at 691 n.3 (emphasizing the importance of effective counsel at the plea stage); *cf. Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (Sixth Amendment guarantees the right to counsel "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected").

Thus, a plea is invalid if taken in violation of the accused's right to counsel. *See Robert M. Brady*, 397 U.S. at 748 ("Since *Gideon v. Wainwright*, it has been clear that a guilty plea to a felony charge entered without counsel and without a

waiver of counsel is invalid." (citation omitted)); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) (reversing conviction and explaining that the Court "do[es] not stop to determine whether prejudice resulted" where the defendant "pleads to a capital charge without benefit of counsel" (citations omitted)). The Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984). A guilty plea is, therefore, invalid if there has been a "complete denial of counsel" or if, under the particular circumstances, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *Id.*; *see also Gochicoa v. Johnson*, 238 F.3d 278, 284 (5th Cir. 2000) (explaining that "official interference with the defense" can result in constructive denial of counsel).

This Court has previously explained the importance of open lines of communication between attorney and client with regard to investigating and formulating a defense strategy. In *Emmett v. Kelly*, 474 F.3d 154 (4th Cir. 2007), the importance of the attorney-client relationship was highlighted in the context of obtaining valuable information directly from the defendant. This Court noted that "'counsel's action[s] are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.'" *Id.* at 168 (quoting *Strickland v. Washington*, 466 U.S. 688, 691 (1984) (alteration omitted)). This reliance "particularly extends to the investigation phase of

counsel's representation." *Id.* What decisions are made by defense counsel with regard to investigation and defense preparation "depend critically" on "'information supplied by the defendant.'" *Id.* (quoting *Strickland*, 466 U.S. at 491). Conversely, a defendant cannot make appropriate tactical decisions without the advice and strategic input of his counsel.[61]

The ability to communicate with counsel about exculpatory evidence is especially crucial given that the defendant is the sole decision maker with regard to whether or not to enter a plea. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (stating that "the accused has the ultimate authority to make certain fundamental decisions regarding the case" including "whether to plead guilty"); *Sanchez*, 50 F.3d at 1453 (a defendant's waiver in the context of a guilty plea cannot be "intelligent and voluntary" if entered into without knowledge of material exculpatory information that may be in the possession of the Government) (citing *Miller v. Angliker*, 848

[61] Consistent with this conception of the Sixth Amendment, unfettered communication on critical matters of defense strategy has been long treated as constitutionally sacrosanct. *See, e.g., McMann*, 397 U.S. at 770 ("[A] decision to plead guilty must necessarily rest upon counsel's answers") (plurality opinion); *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("[A]n accused is entitled to rely upon his counsel . . . to offer his informed opinion as to what plea should be entered."); *Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003) ("[D]efense counsel have a constitutional duty to give their clients professional advice on the crucial decision of whether to accept a plea offer from the Government."). The courts do not permit a denial of open communications regarding whether to plead guilty or go to trial. *See, e.g., Hamilton*, 368 U.S. at 55 (emphasizing the importance of effective counsel at the plea stage).

F.2d 1312, 1320 (2d Cir. 1988)); *Banks*, 920 F. Supp. at 693 (finding that nondisclosure of material evidence to the defendant renders a guilty plea invalid).

Particularly at a "critical stage" – including a plea hearing – a "constructive denial" of counsel requires automatic reversal. *See Childress*, 103 F.3d at 1228. In *Childress*, for example, the court appointed counsel to represent the defendant who pled guilty. *Id.* at 1223. Under applicable state law, however, counsel functioned essentially as "standby counsel" rather than "full-fledged defense counsel" in that he did not, for example, counsel the defendant during the hearing or "discuss strategy." *Id.* at 1231. Instead, his role at the plea hearing was to "determine whether or not the defendant wanted to plead guilty," assist the defendant with waiving a jury trial, and to be present "in case the court required" that "further assistance" be rendered. *Id.* at 1226 (internal quotation marks omitted). The Fifth Circuit held that the conviction was invalid without regard to prejudice because "a defense lawyer who fails to actively assist the defendant during a critical stage of the prosecution is not the counsel whose assistance is contemplated by the Sixth Amendment." *Id.* at 1232.

Here, it is undisputed that material, exculpatory evidence was kept from Moussaoui.[62] *See supra* at 66-78. The fact that Moussaoui was permitted to enter

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[62] *United States v. Ruiz*, 536 U.S. 622, 631 (2002), which held that nondisclosure of impeachment evidence does not invalidate a plea, does not apply here because of the Government's nondisclosure here involved material, exculpatory evidence. *See McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) ("*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme

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a plea without access to this information is simply shocking and certainly renders his plea unknowing and uncounselled. The critical underpinning of this Court's ruling in *Moussaoui II* was that the statements in the intelligence summaries were *reliable* because they were obtained by the intelligence community under conditions that were focused on obtaining the truth. *Moussaoui II*, 382 F.3d at 478. The fact that the district court, the Government, and defense counsel had statements – deemed reliable under *Moussaoui II* – [redacted] that Moussaoui was ***not involved*** in the attacks, and no one shared this with Moussaoui, must render his plea unknowing as a matter of law. With this information, Moussaoui would have known that he had important evidence that could prove his innocence of the September 11th attacks, and surely would have changed his mind about pleading guilty.

Moussaoui's attorneys also were barred from discussing the evidence with him, confirming its existence, or otherwise verifying that the evidence would be available at his trial. JA92-108; CJA1450. Moussaoui, mistrustful of his court-imposed lawyers to begin with, was now confronted with a situation in which these lawyers, out of obligation to the prosecutors, were keeping evidence from him. *See* CJA327. And, he was given no reason to believe that he would be permitted to

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Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.").

use the secret evidence at trial. The district court's restrictions on attorney-client communications left Moussaoui completely in the dark.

Moreover, as the district court recognized, each of Moussaoui's lawyers – who had access to material, exculpatory evidence that Moussaoui did not – were vehemently opposed to his pleading guilty:

> THE COURT: I know this puts you in a difficult position because all counsel in this case are opposed to the defendant's decision, but we all know that the law allows a defendant who is competent the absolute right to determine his own fate as to key issues in a criminal case, the most critical of which is whether to plead guilty or not guilty.

JA1434. But, due to the court's and the Government's restrictions on attorney-client communications, ***none of Moussaoui's lawyers could tell him why they opposed the plea.*** This was, in effect, a complete denial of counsel at *the* critical stage.

As a result, Moussaoui's plea was invalid.

2. Moussaoui Did Not Have Access to Discoverable Information that Has Been Produced Post-Judgment.

The Government recently disclosed the existence and destruction of certain videotaped interrogations of detainees. *See supra* 125-135. These disclosures have received wide press coverage and raise serious questions concerning the validity of Moussaoui's plea. This Court should remand for district court review of these issues.

As explained below, there are two categories of evidence that the Government recently disclosed.

a. [redacted]

In a letter filed December 18, 2007, the Government disclosed for the first time that it has had, [redacted] a videotape [redacted] *See* Dec. 18 Letter. As noted above, Moussaoui had long been identified [redacted] and it would have been critical to his decision to plead to know that someone else [redacted] to that involvement. The Government has also acknowledged that [redacted] before Moussaoui's guilty plea. *See* Dec. 18 Letter. Despite the obvious significance of the recording and transcript, Moussaoui and his counsel do not appear to have received even a summary of [redacted].[63] As of the date of this Brief, the Government has not produced to the defense either the videotape or the transcript of the statements [redacted]

[63] It is unclear from the other evidence produced relating to [redacted] whether substitutes of this recording were produced prior to judgment.

As explained above, a guilty plea is not valid if entered while the defendant is ignorant of material, exculpatory evidence in the Government's possession. *McCann*, 337 F.3d at 788. If the evidence has not been destroyed, the court can easily review it for materiality and the Government's good or bad faith is not an issue. *Brady*, 373 U.S. at 87. However, this Court has made it clear that it will ordinarily only review matters that were first presented to the district court for ruling. This is especially true when the disclosure of a new circumstance requires some development of a factual record. *See United States v. Dyess*, 478 F.3d 224, 231 (4th Cir. 2007) ("In light of the new information, this court remanded the case to the district court, directing it to 'conduct such further proceedings as it may deem appropriate.'"); *see also United States v. Severson*, 3 F.3d 1005, 1013 (7th Cir. 1993) (remanding to district court for further fact-finding in light of potentially relevant evidence produced during appeal). While this Court may retain jurisdiction over the case during the remand, *see generally Dyess*, 478 F.3d at 231, remand serves the vital function of allowing the district court to develop the record, make factual findings, and reach legal conclusions for this Court to review. *See Severson*, 3 F.3d at 1013.

At the very least, this Court should remand this appeal for the district court to review this material, exculpatory evidence and ascertain the effect it would have had on Moussaoui's plea. This material was plainly *Brady* evidence under the

authority set forth above. Depending upon, among other things, what statements appear on the tape and the circumstances under which the tape was made, retained, and kept from Moussaoui and his lawyers, the district court could well conclude that Moussaoui is entitled to vacatur of the plea and a new trial.

[redacted]

On October 25, 2007, the Government disclosed that in September 2007, the CIA notified prosecutors of the existence of at least one videotape[64] of the interrogation [redacted] *See* Oct. 25 Letter. The Government has not produced either the tapes or transcripts of these tapes.

[redacted] was unquestionably a witness with material, exculpatory information about Moussaoui, and, critically, he had exculpatory information that Moussaoui did not himself know. *See generally* Exs. F and G to Remand Reply. From the [redacted] Government's proffered substitution, we know that it was [redacted] *See* Ex. F to Remand Reply. [redacted] *See* Ex. F to Remand Reply. [redacted]

[64] The CIA subsequently notified the Government [redacted] videotape and audiotapes [redacted]

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[redacted] *See* Ex. F to Remand Reply. Also, according to [redacted] *See* Ex. G to Remand Reply.

Once again, a remand is necessary to determine the effect of this disclosure on Moussaoui's plea. Among other things, Moussaoui believed that the written substitutions were unreliable. CJA524; JA1249. However, if Moussaoui or his counsel had been able to compare the substitutions against the raw material, it is reasonably probably that Moussaoui would not have pled. Similarly, on remand, the district court may review the transcripts and/or the tapes to determine whether there is new information – including discussion of other plots without mention of Moussaoui – that would have affected Moussaoui's decision to plead.[65] The

[65] The Government has baldly claimed that the [redacted] tapes are irrelevant because they do not mention Moussaoui or the September 11th attacks. *See* Oct. 25 Letter. However, the Government's claim at trial was that Moussaoui was involved in a conspiracy that was broader than, but inclusive of, the attacks on September 11th; indeed, the Government explained as much in myriad pleadings. *See, e.g.*, Ex. J to Remand Motion, at 51-52 ("Moussaoui is not charged, as standby counsel and defendant have repeatedly phrased it, with September 11. Instead, Moussaoui is charged in six broad conspiracy counts that include as overt acts, *inter alia*, the preparation for and execution of the terrorist attacks of September 11. As the Court itself has held, these conspiracy counts properly include

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district court could also determine whether there are or were other tapes, and ascertain the circumstances under which the tapes were created, retained, and kept from defense counsel.

b. Destroyed or Missing Tapes of Other Interrogations

Tapes of Abu Zubaydah

In a pleading dated December 6, 2007, the Government disclosed that it had destroyed – in the Fall of 2005 – hundreds of hours of tapes of the interrogations of Abu Zubaydah – a fact that that had been widely reported in the press. *See* Government's Opposition. Zubaydah is an important witness to whom Moussaoui sought access in the district court and about whom the Government agreed, including in the Fall of 2005, to produce relevant discovery. *See* Exs. D & E to Government's Opposition.

When the Government has destroyed evidence, there is, of necessity, a "second avenue for demonstrating a *Brady* violation." *United States v. Moore*, 452 F.3d 382, 388-89 (5th Cir. 2006). Under those circumstances, the Government's conduct itself is taken as an indication "that the evidence could form a basis for

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allegations of conduct independent of the September 11 attacks[.]"); Ex. J to Remand Motion at 57; *see also* Ex. K to Remand Motion at 37. Having taken this position, the Government cannot now claim that statements broader than the 9/11 attacks are irrelevant. For example, [redacted] discussed operations or attacks to occur after 9/11, and Moussaoui is not mentioned, that discussion would be exculpatory as to Moussaoui, even under the Government's own theory.

exonerating the defendant," *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988), and the defendant need only show that it was "potentially useful," rather than "material." *Illinois v. Fisher*, 540 U.S. 544, 549 (2004). If the evidence is "potentially useful," the defendant can make out a Due Process violation by showing that the Government acted in bad faith. *Id.*

First, as Moussaoui and his lawyers explained to the district court, Zubaydah was a material witness because he was a senior member of al Qaeda and would have been privy to details of who was to be involved in the September 11th attacks. *See* Exs. D, E, & I to Remand Reply. The intelligence summaries of Zubaydah's interrogations [redacted] *See* Ex. S to Remand Reply [redacted]. Even the district court believed that Moussaoui may have been intended to participate [redacted] Press reports indicate that the taping of Zubaydah's interrogations took place in 2002 and that those tapes were not destroyed until November 2005, *see* Exs. A, B, & C to Remand Reply, but they were never produced to the district court, despite direct questions on point. The district court did rule that Moussaoui could not have access to Zubaydah, Ex. H to Remand Reply, however, it is now clear that the district court reached that conclusion

without access to or knowledge of the existence of the videotapes of Zubaydah's interrogations.

Moreover, the timeline relating to the destruction of the Zubaydah tapes raises concerns:

- On May 2, 2005, the district court asked the Government to disclose a broad set of information about the detainee interrogations, including whether the interrogations were recorded. *See* Ex. L to Remand Reply.
- On May 27, 2005, defense counsel filed a Motion for Reconsideration, seeking access to Zubaydah, or alternatively, updated discovery about Zubaydah. *See* Ex. M to Remand Reply.
- On June 10, 2005, the Government opposed access to Zubaydah; however, the Government represented to the district court that the Government would continue to produce discovery relating to Zubaydah: "statements by Zubaydah relating to the 9/11 operation or to Moussaoui should have been or will be pulled and produced to the defense as part of the general discovery production under CIPA § 4 in this case." *See* Ex. N to Remand Reply at 6.
- On November 3, 2005, the district court reconsidered its order of May 2, 2005, but still ordered the Government to "confirm or deny that it has video or audio tapes of these interrogations." *See* Ex. O to Remand Reply.
- On November 14, 2005, the CIA submitted a declaration that the "U.S. does not have any video or audio tapes of the interrogations of [redacted]." *See* Oct. 25 Letter at 4.
- At a November 14, 2005, CIPA hearing, the district court noted that there were [redacted] witnesses to whom the defense still wanted access: [redacted] and Zubaydah. The district court stated: "Now, in terms of your wanting access to these other [redacted] witnesses, you're going to have to make a specific showing to me of what noncumulative information each of these witnesses would have that you don't already get from [redacted]

third fellow, all right? . . . [O]nce I have seen what specific additional information these [redacted] might be able to provide to the defense, then I can more realistically evaluate whether there's a need to engage in this balancing act." Ex. P to Remand Reply.

- On November 29, 2005, pursuant to Protective Orders (Ex. Q to Remand Reply), the Government produced additional discovery on Zubaydah, including intelligence summaries. Nowhere in these productions did the Government produce the tapes or disclose the existence of the tapes.
- On December 7, 2005, in response to the Court's request on November 14, 2005, defense counsel filed an *ex parte* supplemental pleading describing the non-cumulative, exculpatory evidence possessed by Zubaydah and others. *See* Ex. I to Remand Reply. Once again, defense counsel had no information at the time about the existence or destruction of tapes.
- On February 28, 2006, the Court denied the motion for reconsideration filed by defense counsel with regard to Zubaydah. Ex. R to Remand Reply. The Court agreed with the Government that "the defendant ha[d] not offered sufficient reasons to justify reconsideration of [the] earlier decision denying access to this witness." Ex. H to Remand Reply.
- In late February or early March 2006 – when the district court was still considering whether to permit access to Zubaydah and immediately prior to the beginning of the death eligibility phase of Moussaoui's trial – a prosecutor in the Eastern District of Virginia may have disclosed to then-Assistant United States Attorney Robert Spencer, one of the Government prosecutors in this case, that the CIA made, and later destroyed, recordings of the interrogations of Zubaydah. *See* Dec. 18 Letter.

The destruction of the Zubaydah videotapes took place at precisely the time that (1) The district court was considering a motion for access to Zubaydah by Moussaoui's lawyers; (2) the Government was representing that it would be producing all discovery related to Zubaydah; and (3) The district court was asking

that the Government "confirm or deny that it has video or audio tapes of these interrogations" of other detainees. Obviously, destruction of the videotapes in this context raises red flags, to say the least, and the district court should investigate this matter in the first instance.

Lost or Destroyed Tapes of [redacted]

In a pleading dated December 6, 2007, the Government also disclosed that it made, and either lost or destroyed, at least one other tape of an interrogation, that [redacted] This raises the same issues as set forth above for the destroyed Zubaydah tapes and requires a remand to the district court.

In sum, these individuals had relevant information, much of which was exculpatory. The Sixth Amendment question of Moussaoui's access to them was critical to his decision to plea. The very existence of these recordings may well have changed the calculus. Moussaoui was also denied, at the time of his plea, any access to the remainder of what these individuals said, as were his lawyers, and as was the district court. Under the circumstances, any destroyed evidence related to these witnesses plainly qualifies as "potentially useful." *See United States v. Femia*, 9 F.3d 990, 995 (1st Cir. 1993) (holding that, where police transcribed portions of interrogation tapes and destroyed the remainder, "the lost audio portion and statements not transcribed" were potentially useful because they "***might*** have contained material exculpatory evidence" (emphasis added)).

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As this Court knows from the extensive briefing on Moussaoui's motion to remand, we are not in a position to know what tapes may now exist, what may be on those tapes, or what tapes existed at the time of the plea or sentencing, but have now been destroyed. There is also no evidence before this Court of the content of the destroyed tapes. We will not belabor the points made in the briefing of the remand motion. For present purposes, it is sufficient to underscore that the Government's disclosures raise far more questions than they answer, and a remand is required to resolve a number of issues relating to Moussaoui's plea. In sum, Moussaoui is entitled to the factual determinations that will ultimately enable this Court to determine whether the plea was sufficiently knowing in light of the Government's recent disclosures about destroyed evidence.

B. THE PROCESS USED BY THE DISTRICT COURT RELATING TO MOUSSAOUI'S PLEA LED HIM TO BELIEVE THAT HE WAS PLEADING GUILTY TO A CONSPIRACY DIFFERENT THAN THE ONE IN THE INDICTMENT.

1. Facts Relating to Moussaoui's Guilty Plea.

Twice in 2002, following rulings that restricted Moussaoui's right to effective representation, Moussaoui attempted to plea *nolo contendere* or guilty. JA678-79; JA995. Each time, Moussaoui disavowed any involvement in the September 11th attacks. JA678; JA1002. Each time, the district court rejected the plea because a guilty plea was inconsistent with denial of involvement in those

attacks. *See* JA678 (entering plea of not guilty since court did not believe Moussaoui wished to plead guilty); JA779-80 (rejecting plea of *nolo contendere* and stating "[i]t has been consistently clear in the defendant's numerous motions that he contests the allegations in the Superseding Indictment"); JA1036, 1023, 1029-33 (stating that Moussaoui may not plea guilty while denying a role in the September 11th attacks).

In April 2005, immediately after the Supreme Court declined to review the issue of Moussaoui's access to Detainees, Moussaoui again informed the district court that he wished to plead guilty. JA6334.

Without Moussaoui present, the district court discussed a draft Statement of Facts with counsel for both parties and cautioned the Government not to specifically mention the September 11th conspiracy in its list of facts to be admitted. JA6351. The district court believed that Moussaoui would not admit to any involvement in the September 11th conspiracy, and noted (based on classified evidence that Moussaoui had not been permitted to see) that, "there's no evidence in this record he knew about that particular target [the World Trade Center] or that particular [September 11th] attack going forward. In fact, the evidence is to the contrary. They cut him out." JA6353-54.

As ultimately drafted, the Statement of Facts required Moussaoui to admit membership in al Qaeda and to admit making plans for some attack other than those attacks which occurred on September 11th. It alleged that "Al Qaeda was an international terrorist group dedicated to opposing the United States with force and

violence," JA1409 (SOF ¶ 1), and that Moussaoui was "a member of al Qaeda," JA1410 (SOF ¶ 4); that al Qaeda planned "an operation in which civilian commercial airliners would be hijacked and flown into prominent buildings, including government buildings, in the United States," JA1410 (SOF ¶ 7); and that "Moussaoui knew" about "al Qaeda's plan" and agreed to go to the U.S. to take part in "the plan," which involved "Moussaoui attacking the White House." JA1410 (SOF ¶ 9). It did not state that the "plan" of which Moussaoui had knowledge involved the attacks on the World Trade Center and the Pentagon, or on the flight that was hijacked and crashed in Pennsylvania. *See generally* JA1409-13.

The "Dress Rehearsal"

On April 20, 2005, the district court held a "dress rehearsal" for the plea colloquy. *See* JA6375-76. After asking Moussaoui what day of the week it was, and discussing with Moussaoui the apparent contradiction between his complaint that his attorneys were trying to kill him and his stated desire to receive the death penalty, the Court concluded that Moussaoui was competent to enter his plea. JA6377, 6380-93. The district court then walked through the Rule 11 inquiry.[66]

[66] Defense counsel again warned the court that Moussaoui was laboring under the mistaken belief that he would retain his right to petition the Supreme Court for review of the witness-access issue following a guilty plea. Moussaoui "felt that he would not waive his appeal rights, that the Supreme Court would still be very interested in hearing the issue about the witnesses. . . . He told me that he did have the right to take that appeal up. He wanted that appeal to go up." JA6387-88. While the court previously acknowledged that Moussaoui would need to

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Entry of the Plea

On April 22, 2005, Moussaoui entered his guilty plea.

Section 3005 of Title 18 entitles a capital defendant to two court-appointed lawyers, 18 U.S.C. § 3005, and, due to the size and complexity of the case, here the district court had appointed multiple counsel – Yamamoto, MacMahon, and Dunham – to represent Moussaoui. JA39; JA41; JA574-75. For the 2005 plea hearing, however, the district court barred all but Yamamoto from assisting Moussaoui. SJA15. Defense counsel objected, pointing out that Yamamoto was not the lawyer responsible for key areas related to the plea. SJA14. The Court overruled the objection, forcing counsel to sit out this critical stage in the gallery, on the grounds that, in the Court's view, counsel did "not want the defendant to enter a guilty plea" and that counsel's involvement might "undercut this process."[67] SJA15. Thus, the hearing went forward with only Yamamoto able to counsel Moussaoui. JA1416.[68]

With that restraint in place, Moussaoui then signed the Statement of Facts. JA1436. Although he admitted belonging to al Qaeda and participating in a

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understand his appellate rights, the District Court did not further address the issue during the "dress rehearsal" before the Rule 11 colloquy. JA6392-93.

[67] Yamamoto, like his colleagues, opposed the plea. JA1433-34. But, the district court evidently assessed that he would be less likely to "undercut the process." SJA15.

[68] This clearly violated the mandate of *United States v. Boone*, 245 F.3d 352, 358-60 (4th Cir. 2001) (requiring two qualified counsel in all death penalty cases).

conspiracy to attack the United States, he continued to maintain that he did not participate in any conspiracy relating to the September 11th attacks. JA1440-41. He noted that the Statement of Facts did not allege that he was part of the September 11th conspiracy and stated that "I came to the United States of America to be part, okay, of a conspiracy to use airplane as a weapon of mass destruction, I was being trained on the 747 400 to eventually use this plane as stated in this statement of fact to strike the White House, ***but this conspiracy was a different conspiracy tha[n] 9/11***." JA1440 (emphasis added). Moussaoui explained that, rather than conspiring to commit the attacks on the United States, he was involved in a conspiracy to free Sheik Omar Abdel Rahman, a.k.a., the "Blind Sheikh." JA1440. He emphasized, at length, that he was not guilty of the September 11th conspiracy. *See, e.g.*, JA1443 ("I have been saying that I was part of a different conspiracy. . . ."); JA1444 ("[I] was not part of 9/11, okay?"). Moussaoui's final statement during the hearing was: "Everybody know that I'm not 9/11 material." JA1445. The balance of the Rule 11 colloquy was filled with confusing discussions – summarized in subsection 2 below – and as a result, Moussaoui did not understand the charges to which he was pleading.

During the hearing, Moussaoui made clear that the denial of access to the enemy combatants and other related evidence was a strong motivation for his plea:

> . . . ***I want to preserve the issue of substitution for my appeal*** because you can, you can really imagine when the government will bring the victim impact story and many thing to the jury, what is going to weight, a CIA piece of paper of substitution stating that Mr. Khalid Sheikh

> Mohammed say this? What is going to weight in front of a jury? Nothing.
>
> Whereas by preserving, by not accepting the substitution, by saying that we are going to follow what you have said, the judge, that this substitution were inadequate, unfair, it was not giving me a fair trial, and you restate, put this aside, okay, and we are not agreeing to anything with the government and we present the case that I have been saying that I was part of a different conspiracy in the sentencing phase, is then this preserve my chance in front of the Supreme Court to, to raise the issue of substitution and to raise the issue of fair trial.

JA1442-43 (emphasis added). The Court responded that "[t]hese are, in fact, issues that are going to be addressed, but this is not the time or place." JA1443.

Despite the confusion, the district court accepted Moussaoui's plea. JA1437. At the time he pled guilty, Moussaoui still had not been told by the district court, defense counsel, or anyone else about the exculpatory statements given by the Detainees. *See supra* at 66-78. None of that information was provided to Moussaoui at the time of his plea, and only a fraction of it was declassified a year later as part of the penalty-phase trial. CJA1362-66.

Less than two weeks after entering his plea, on May 3, 2005, Moussaoui filed a *pro se* letter stating that he was not a participant in the September 11th conspiracy. JA1449-52.

2. The District Court Did Not Properly Inform Moussaoui About the Charges to Which He Was Pleading.

Because of the serious implications of pleading guilty, Federal Rule of Criminal Procedure 11 establishes a number of requirements that district courts must follow to make "the constitutionally required determination that a defendant's

guilty plea is truly voluntary" and "to produce a complete record" of the relevant factors "at the time the plea is entered." *McCarthy v. United States*, 394 U.S. 459, 465 (1969). Among other things, the district judge must "address the defendant personally in open court" and "inform the defendant of, and determine that [he] understands . . . ***the nature of each charge*** to which [he] is pleading." Fed. R. Crim. P. 11(b)(1)(G) (emphasis added). The district court must therefore ensure that the defendant understands "the law in relation to the facts." *Boykin v. United States*, 395 U.S. 238, 243 (1969) (citing *McCarthy*, 394 U.S. at 466). "There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him." *McCarthy*, 394 U.S. at 470.

Here, the Government charged Moussaoui in six separate conspiracy counts. A conspiracy is an agreement between two or more persons to commit "an unlawful act" or to commit "a lawful act by unlawful means." *United States v. Burgos*, 94 F.3d 849, 860 (4th Cir. 1996) (*en banc*) (internal quotation marks omitted). The "nature" of any given conspiracy is "determined by reference to the agreement which embraces and defines its objects." *Braverman v. United States*, 317 U.S. 49, 53 (1942).

In a complex conspiracy case, a district court does not discharge its duty to ensure that the defendant understands the "nature" of the charge simply by telling the defendant the elements of criminal conspiracy. *United States v. Van Buren*, 804 F.2d 888, 891-92 (6th Cir. 1986) (vacating conviction despite reading of the

indictment and defendant's indication that he had no questions). In *Van Buren*, for example, the defendant attempted to plead guilty to a drug conspiracy charge. During the Rule 11 colloquy, the indictment was read to the defendant, setting forth the elements of the offense; the defendant told the court what he had done, including his particular cocaine transaction; and the defendant indicated he had no questions about the charge. *Id.* at 891. The Sixth Circuit vacated the plea, holding that this procedure left unclear both "the connection between the defendant and the conspiracy" and "whether [the] defendant understood [that] the government had to prove a connection." *Id.* at 892. "Where the charge is more complex, and uses concepts or terms that may be foreign to a lay person," Rule 11 requires more effort to ensure that the defendant understands. *Id.*

In short, the court may not assume from "yes" or "no" answers that the defendant understands complex concepts of conspiracy. *See United States v. Frye*, 738 F.2d 196, 201 (7th Cir. 1984) (finding Rule 11 violation). "[P]articularly when the conspiracy charged is complex, more effort is needed to explain the ***nature*** of that charge." *See United States v. Ray*, 828 F.2d 399, 407 (7th Cir. 1987) (emphasis added); *Van Buren*, 804 F.2d at 892 (vacating conviction). As set forth below, it is clear that the Indictment charged Moussaoui with participation in the September 11th attacks and that the overall plea procedure led Moussaoui to understand that he was pleading to something else.

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3. The Second Superseding Indictment Charged Moussaoui with Conspiracies that Included the September 11th Attacks as an Object.

In this case, the object of the charged conspiracy was plainly the September 11th attacks. For several reasons, the Government cannot seriously dispute this.

First, the Indictment is clear on its face that the September 11th attacks were the primary objective of the conspiracy as indicted. *See generally* JA803-32. Each of the six counts alleged that Moussaoui engaged in a conspiracy "in the Eastern District of Virginia," situs of the Pentagon, "the Southern District of New York," situs of the World Trade Center, "and elsewhere." JA808, 826-30. The Indictment further alleged that Moussaoui "intentionally and specifically engaged in an act of violence" and that "victims died as a direct result of the act." JA831. Five of the six counts alleged that Moussaoui's conspiracy resulted "in the deaths of thousands of persons on September 11, 2001." JA809, 826-28, 830. All nineteen September 11th hijackers are named as co-conspirators. JA807-08. And, as the district court noted, "[a]pproximately seventy-five percent of the Indictment concerns the activities of the nineteen alleged hijackers on and before September 11, 2001." *United States v. Moussaoui*, 282 F. Supp. 2d 480, 483 (E.D. Va. 2003).

Second, the September 11th attacks were essential to the Indictment because they were the only basis for venue in the Eastern District of Virginia. *See* U.S. Const. art. III, § 2, cl. 3 (requiring that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."); U.S. Const. amend. VI (reinforcing that trial must be in "the State and district wherein the crime shall

have been committed"); *United States v. Al-Talib*, 55 F.3d 923, 928 (4th Cir. 1995) (explaining that, in a conspiracy case, venue is proper only where some act in furtherance of the conspiracy was committed). According to the Indictment, the only act to have occurred in the Eastern District of Virginia was the September 11th attack on the Pentagon, JA824, while all of the alleged conduct by Moussaoui himself took place in Minnesota, Oklahoma, and outside of the United States, JA808, 814-15.[69]

Third, the Government has repeatedly represented that the charged conspiracy included the September 11th attacks. For example, according to the Government:

- "[T]he charged conspiracy resulted in the September 11th attacks, and the murder of nearly 3000 innocent victims . . . ." JA1155;
- "[T]he conspiracies involve plots that include, as overt acts, the attack of September 11." JA916;
- "Moreover, the factual dispute in this case is not whether the events of September 11 happened, but, instead, whether defendant was a participant in the conspiracy that committed the terrorist acts." JA645;
- "The Indictment alleges, *inter alia*, that Moussaoui conspired with members and associates of Usama Bin Laden's *al Qaeda* organization

[69] See also *infra* at 159-161, explaining that the Eastern District of Virginia was not a proper venue.

to commit the terrorist attacks that resulted in the September 11, 2001, deaths of thousands of people in New York, Virginia, and Pennsylvania." JA166.[70]

In addition, in a recent letter to this Court regarding previously undisclosed evidence, the Government said: "Like the first videotape, the contents of the second video tape and the audio tape have no bearing on the Moussaoui prosecution – they neither mention Moussaoui nor discuss the September 11 plot." JA5629C.

Fourth, the September 11th attacks had to be an object of the conspiracy or Moussaoui's act had to result in a death on September 11th in order for Moussaoui to be eligible for the death penalty. The Government sought the death penalty in connection with Counts One, Three, and Four in the Indictment.[71] JA115-23.

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[70] On the day of the indictment, Attorney General Ashcroft confirmed: "This morning a grand jury in the Eastern District of Virginia charged Zacarias Moussaoui . . . with conspiring with Osama bin Laden and al Qaeda to murder thousands of innocent people in New York, Virginia and Pennsylvania on September the 11th." J. Ashcroft, U.S. Atty. Gen., News Conf. Regarding Zacarias Moussaoui at the Dep't of Justice Conference Ctr. (Dec. 11, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks12_11.htm. The Justice Department's press release that day, titled "Department of Justice Indicts Moussaoui for September 11th attacks," stated: "The indictment makes clear the work of Moussaoui in concert with unindicted co-conspirators Mustafah Ahmed al Hawsawi and Ramzi Binalshibh, currently believed to be fugitives in Afghanistan, to carry out the September 11th attacks." Press Release, Dep't of Justice, Dep't of Justice Indicts Moussaoui for September 11th attacks (Dec. 11, 2002), *available at* http://www.usdoj.gov/opa/pr/2001/December/01_ag_641.htm.

[71] The Government also sought the death penalty on Count Two, but the District Court struck the death notice as to that count. JA1482-94.

Each of those statutes permit capital punishment *only* in the event that death results from the defendant's own acts as part of the conspiracy. *See* 18 U.S.C. § 34 (Count Three); § 2332a(a) (Count Four); § 2332b(c)(1)(A) (Count One). As no deaths were charged in the Indictment other than those resulting from the September 11th attacks, without a conviction for conspiracy resulting in those deaths, there would be no need even for a death penalty phase trial.

Finally, this Court has recognized that the Indictment, on its face, charges Moussaoui with a conspiracy to commit the September 11th attacks:

- "Moussaoui, an admitted al Qaeda member, was arrested approximately one month prior to September 11. [. . .] A subsequently issued indictment alleges that until the time of his arrest, Moussaoui was a part of the planned attacks." *United States v. Moussaoui*, 333 F.3d 509, 512 (4th Cir. 2003);
- "Zacarias Moussaoui is charged with multiple offenses stemming from . . . his alleged involvement in the September 11, 2001 terrorist attacks." JA1399.

Thus, the "nature" of the charged conspiracy, reflected in all six counts, included the September 11th terrorist attacks as an essential objective. The district court was therefore obligated, prior to accepting a guilty plea, to explain to Moussaoui – and to ensure that he understood – that the legal effect of his plea would be to admit to participating in a conspiracy including those attacks. *See* Fed. R. Crim. P. 11(b)(1)(G).

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4. Moussaoui Believed He Was Pleading Guilty to a Conspiracy Different than the One Alleged in the Indictment.

From the time of his indictment, Moussaoui denied that he was a part of any conspiracy that included the September 11th attacks as an objective.[72] Indeed, Moussaoui's repeated denials are precisely what led the district court to reject Moussaoui's attempted guilty plea in 2002. *See* JA1026-36.[73] The district court ruled that it could not accept a guilty plea to a conspiracy the essence of which was not the September 11th attacks. JA1030 ("So, for example, if you came to the United States to learn how to fly crop duster planes because down the road maybe you were going to poison somebody's water supply, that's not the conspiracy alleged in this case."). In short, the court found it "clear" that Moussaoui was "not admitting to the essential elements of the conspiracies that are described" in the Indictment. JA1036.[74]

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[72] *See, e.g.*, JA779-80 ("It has been consistently clear in the defendant's numerous motions that he contests the allegations in the Superseding Indictment."); JA796D (attempting to plead "no contest" and explaining that "NO CONTEST IS NOT GUILTY FOR SEPT. 11"); JA731-34 ("[Z]acarias Moussaoui was not with the 19 hijacker."); JA623-25 ("The FBI is maliciously prosecuting the SLAVE OF ALLAH Zacarias Moussaoui despite there extensive knowledge of what I was doing in the U.S. and that he was not link with the so called 19 hijackers."); JA738 ("I was not with the 19 hijacker . . . ."); JA1024 ("You, you will tell me where in the indictment it is alleged, at which in the indictment, which point in the indictment it's alleged that I even, I knew about September 11.").

[73] At the time, standby counsel explained that Moussaoui did not understand the difference between being a member of al Qaeda and being a member of the conspiracy charged in the Indictment. JA869-71.

[74] Thereafter, Moussaoui continued to deny that he was involved in the September 11th conspiracy. *See, e.g.*, JA6248 ("I was ***not*** 9/11 material but a wannabe ***post-***

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In April 2005, when the district court accepted his plea, Moussaoui similarly demonstrated a profound misunderstanding of what he was pleading to, and the process leading to the April 2005 plea only exacerbated that misunderstanding. At a hearing prior to the plea (from which Moussaoui was excluded), the district court emphasized that Moussaoui was reading the Indictment too "literally" and that, based on the failed April 2002 plea attempt, Moussaoui would not plead guilty to any involvement in a conspiracy that included September 11th attacks. JA6351-54. The court also observed that "there's no evidence in this record he knew about that particular target or that particular attack going forward. In fact, the evidence is to the contrary. They cut him out." *Id.*

The Government also evidently recognized that Moussaoui would not plead guilty to conspiracy to commit the September 11th attacks. To ensure that Moussaoui would go forward with the plea, the Government artfully drafted the Statement of Facts to avoid requiring him to admit specifically to participation in the September 11th conspiracy, even though that was precisely the offense with which he was charged. *See* JA6351-54. As the district court recognized:

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9/11 terrorist . . . ."); JA6194. ("ZM WAS NOT PART OF 9/11 . . . ."); JA6139 ("I have been saying my non 9/11 status since the 9/11."); JA6111 ("[Zacarias Moussaoui] . . . has nothing to do with 9/11 . . . ."); JA5865-69 ("They know I can prove that I was involve in another conspiracy tha[n] September 11. . ."); JA1067 ("All evidence showing clearly that I was not in 9/11 operation have been classified secret. In 9/11 case there is no evidence against Zacarias Moussaoui so that is why he cannot see anything.").

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> THE COURT: All right. That's the proposed statement of facts that I plan to send him this morning so he's had a night to think about it before I see him tomorrow. ***If he admits to those facts*** -- now, those facts do not – and I haven't studied them in depth, Mr. Spencer, you can tell me if I'm wrong on this, but ***they don't actually say that he knew about September 11***. They put him in that – in the general conspiracy.

JA6351-54 (emphases added). Moussaoui, on the other hand, believed that he was pleading guilty to participating in a wholly separate conspiracy. JA1440.

In this context, it was the district court's responsibility during the Rule 11 colloquy to conduct a "searching . . . inquiry," *United States v. Damon*, 191 F.3d 561, 566 (4th Cir. 1999), to ensure that Moussaoui understood "the law in relation to the facts." *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (citation omitted); *Damon,* 191 F.3d at 564-66. But, rather than conducting the required inquiry, the district court simply presented Moussaoui with the carefully drafted Statement of Facts and described the elements of conspiracy in the most general terms. *See generally* JA14-18; JA1425-32. During the colloquy, it became clear that Moussaoui was familiar with the Statement of Facts but not with the Indictment. In fact, Moussaoui told the court that it had been a long time since he had reviewed the Indictment. JA1418. As a result, the Rule 11 hearing on April 22, 2005, did nothing but further confuse Moussaoui.

Moussaoui then explained that he believed, based on the Statement of Facts, that he was not pleading guilty to anything relating to the September 11th attacks:

> THE DEFENDANT: . . . And I'm afraid that ***this statement of fact*** and Mr. Dunham or the prosecution, the

> government, will ***point out to me a single paragraph where they say that 9/11.***
>
> I ask the government to point out to me a single paragraph where they say I am specifically guilty of 9/11 –
>
> THE COURT: All right.
>
> THE DEFENDANT: – because the government had said that there is a broader conspiracy to use airplane as weapon of mass destruction. If that's absolutely correct, that I came to the United States of America to be part, okay, of a conspiracy to use airplane as a weapon of mass destruction, I was being trained on the 747 400 to eventually use this plane as stated in this statement of fact to strike the White House, ***but this conspiracy was a different conspiracy tha[n] 9/11.***

JA1440 (emphases added).

Moussaoui insisted he was pleading guilty to participating in an **inchoate** conspiracy relating to a future operation to free Sheik Omar Abdel Rahman (the "Blind Sheikh"). JA1440. Moussaoui repeatedly emphasized that "this conspiracy was a different conspiracy tha[n] 9/11," JA1440, and that "I was not part of 9/11," JA1444, and that "[e]verybody know[s] that I'm not 9/11 material," JA1445. Moussaoui stated that he intended to continue to argue in the sentencing phase that he was "part of a different conspiracy." JA1442-43.

The district court's Rule 11 error requires reversal. Where a district court violates Rule 11, the conviction must be reversed if there is "a reasonable probability that, but for the error," the defendant "would not have entered the

plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004).[75] However, if the Rule 11 error undermines the "knowing" or "voluntary" character of the plea, the conviction cannot be "saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Id.* at 84 n.10. Notwithstanding the indications that Moussaoui did not understand the charge to which he was pleading guilty, and the fact that the district court had previously ***rejected*** pleas when Moussaoui similarly denied involvement in September 11th, the district court nonetheless accepted the plea in April 2005. The district court did so understanding that the legal effect, under well established law, would be Moussaoui's conviction of the conspiracy in the Indictment[76] – the primary object of which was the September 11th attacks and not some inchoate conspiracy. The court never probed Moussaoui's understanding, never sought to understand the distinction in Moussaoui's mind between this plea and the failed 2002 plea, never explained the "nature" of the conspiracy charged in the Indictment, and never informed Moussaoui that he was about to plead guilty to conspiring to commit the September 11th terrorist attacks.

The defects in this plea go directly to the knowing and voluntary nature of the plea, and therefore, under *Dominguez Benitez*, no showing of prejudice is required to invalidate the plea. However, even under the more rigorous standard,

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[75] This burden is less than a "preponderance of the evidence." *Dominguez Benitez*, 542 U.S. at 83 n.9.

[76] *See, e.g., Libretti v. United States*, 516 U.S. 29, 38 (1995).

the record leaves no room to speculate or argue about what Moussaoui would have done had the district court properly explained the charges because, during the plea hearing itself, Moussaoui vehemently protested that he was innocent of the charged conspiracy to commit the September 11th attacks. Therefore, had the district court discharged its duty to explain the charges and to make clear to Moussaoui that he was about to plead to the September 11th conspiracy, there is at least a reasonable probability that Moussaoui would not have pled guilty. In short, Moussaoui's plea was defective under either standard, and this Court should therefore vacate the plea.

C. THE DISTRICT COURT ERRED IN ACCEPTING MOUSSAOUI'S GUILTY PLEA IN THE ABSENCE OF ANY FACTUAL BASIS THAT MOUSSAOUI WAS INVOLVED IN THE SEPTEMBER 11TH ATTACKS.

Rule 11 also requires the district court to "determine that there is a factual basis for the plea." Fed. R. Crim P. 11(b)(3). This requirement "is intended to ensure that the court make clear exactly what a defendant admits to, and whether those admissions are factually sufficient to constitute the alleged crime." *United States v. Mastrapa*, __F.3d __, No. 06-4512, 2007 WL 4326946, at *7 (4th Cir. Dec. 12, 2007) (internal quotation marks omitted).[77] This means that prior to entering a conviction, "'the district court *must* determine'" that there is evidence of

[77] *See also McCarthy v. United States*, 394 U.S. 459, 467 (1969) (explaining that Rule 11 is intended "to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" (quoting Fed. R. Crim. P. 11, Notes of Advisory Committee on Criminal Rules)).

every element of the charged offense. *Id.* at **6-7 (quoting Rule 11(b)(3) (emphasis in *Mastrapa*) and vacating a conviction because the district court had no evidence of one element). If the defendant's admissions do not establish every element, the district court must look to the record to "fill the gap." *Id.* at *5.

Put another way, a guilty plea – to a conspiracy charge, or to any other charge – is "more than a confession . . . that the accused did various acts." *United States v. Broce,* 488 U.S. 563, 570-71 (1989) (citation omitted). It is "an admission that he committed ***the crime charged*** against him." *Id.* (citation omitted) (emphasis added). Thus, when a defendant pleads guilty, the scope of the ensuing judgment is determined by the "precise manner in which [the] indictment is drawn." *Sanabria v. United States*, 437 U.S. 54, 65-66 (1978).[78] Rule 11, therefore, prohibits a district court from accepting a guilty plea that is based on a conspiracy distinct from the one charged in the indictment. *See United States v. Douglas-Ramos*, No. CR 02-21-3-M, 2003 WL 366631, at *2 (D.N.H. Feb. 14, 2003) (vacating conviction); *see also United States v. Perez*, 338 F. Supp. 2d 154, 156 (D. Me. 2004) ("I do not believe that 'scope' of the conspiracy can be extracted from the elements of the offense as that term has been used conventionally and therefore I would not entertain a partial plea that contested the

[78] This is because "an important function of the indictment is to ensure that, in case any other proceedings are taken against [the defendant] for a similar offence, . . . the record [will] sho[w] with accuracy to what extent he may plead a formal acquittal or conviction." *Sanabria*, 437 U.S. at 66 (internal quotation marks omitted).

scope of the conspiracy."); *id.* at 157 ("I conclude that the defendant cannot enter a partial plea of guilty while reserving the issue of conspiracy scope for a jury trial."). For example, in *Douglas-Ramos*, the defendant pled guilty to conspiracy with two named co-conspirators and "other persons" to distribute the drug ecstasy from December 2001 through February 2002. 2003 WL 366631, at *1. During sentencing, however, she disavowed involvement in any conspiracy with "other persons" besides the named co-conspirators or any conspiracy with a scope or purpose beyond possession and distribution of ecstasy on two occasions in 2003. *Id.* ("That is, defendant acknowledges her guilt only with regard to a conspiracy *different from* that charged in the indictment."). The court held that the conspiracy admitted was different, as a matter of law, from the charged conspiracy. *Id.* at *1 n.1. The plea was, therefore, void:

> While it is not necessary for defendant to know all the participants in a conspiracy, or to be aware of its actual scope, ***she cannot providently plead guilty to the conspiracy charged in the indictment by redefining it*** as some other distinct conspiracy – one of more limited scope, purpose, duration, and membership.

Id. at *2 (emphasis added).

The reasoning in *Douglas-Ramos* applies with equal force here: Moussaoui, with the Government's encouragement, attempted to plead guilty to a fundamentally different conspiracy from that charged in the Indictment. He was indicted for conspiring to commit the September 11th attacks but then pled guilty for conspiring to do something else – expressly not including the September 11th

attacks. Indeed, the district court acknowledged these limitations on the factual basis for the plea, noting at a February 7, 2006, CIPA hearing that Moussaoui had admitted only that "he was here to do a different mission" from September 11th, and that "he was here to help get the [blind] sheikh out" or "fly a plane into the White House." CJA1816, CJA1835. That is not the conspiracy charged in the Indictment. Whatever conspiracy Moussaoui may have believed himself guilty of, its objectives did not include the September 11th attacks – *i.e.*, it was a conspiracy of a different "nature." *See Braverman v. United States*, 317 U.S. 49, 53 (1942). His denial that he was involved in a conspiracy to commit the attacks and his insistence that his "conspiracy was a different conspiracy tha[n] 9/11" was an assertion of innocence – totally inconsistent with the required "admission that he committed the crime charged against him." *Broce*, 488 U.S. at 570 (citation omitted).

Similarly, because the indictment controls, the defendant may not narrow the scope of, or plea to a conspiracy distinct from, the conspiracy charged in the Indictment. *See United States v. Cohen*, 459 F.3d 490, 498-99 (4th Cir. 2006) (rejecting defendant's attempt to limit guilty plea to stipulated facts where the district court explained the nature and scope of the conspiracy in the Rule 11 colloquy); *Douglas-Ramos*, 2003 WL 366631, at *2 (vacating plea for inadequate factual basis because defendant had attempted to plead guilty "to a conspiracy

different from the one charged in the indictment"). In *Cohen*, the defendant, who pled guilty to conspiracy to commit health care fraud, argued on appeal that the district court erred in calculating restitution because "he effectively limited his role in the conspiracy (and, thereby, the amounts he owed in restitution) in the plea agreement," which included a "factual stipulation." 459 F.3d at 492, 498-99. This Court held that a factual stipulation cannot "rewrite" the indictment, particularly where the plea colloquy makes clear that the defendant understood the nature of the charge. *Id.* at 498-99.

In this case, the district court accepted the plea without any factual basis for finding that deaths resulted from the conspiracy to which Moussaoui believed he pled. Because this was an essential element of Counts One, Three, and Four, *see* JA809, 826-30, the resulting conviction on those counts is invalid. *See id.* at *7 (explaining that "[t]o allow a district court to accept a guilty plea from a defendant who did not admit an essential element of guilt under the charge" would "cast doubt upon the integrity of our judicial process").

A fact is an "element" if it "increases the maximum punishment that may be imposed on a defendant." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 482-84, 490 (2000)).[79] Thus, when a

[79] Hypothetically, if Moussaoui had admitted that the conspiracy in which he was involved resulted in a death, this would not obviate the need for a death eligibility

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statute requires a particular finding as a condition to imposition of the death penalty, that fact functions as an element of the offense. *Ring v. Arizona*, 536 U.S. 584, 609 (2002); *United States v. Jackson*, 327 F.3d 273, 284 (4th Cir. 2003). By this test, each of Counts One, Three, and Four included, as an essential element, that the conspiracy caused the death of at least one person. *See* 18 U.S.C. § 2332b(c)(1)(A) (Count One) (death penalty only possible if conspiracy results in death to any person); 18 U.S.C. § 34 (Count Three) (same); *id.* § 2332a(a) (2001) (Count Four) (same).

The only deaths at issue in this case were those on September 11th. *See* JA803-32 (Indictment). At the time of the plea and beforehand, Moussaoui repeatedly denied involvement in any conspiracy that caused those deaths. *See* JA1425-26; JA1440. In light of these denials, the district court was required to examine the record for evidence that could "fill the gap" in Moussaoui's admissions. *See Mastrapa*, 2007 WL 4326946, at *5. But the district court did not perform this examination. To the contrary, the district court itself separately acknowledged that the record established Moussaoui's *non*involvement in the

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sentencing phase. The death eligibility sentencing phase would have been required to determine whether Moussaoui's particular act "directly resulted" in a death. *See* 18 U.S.C. § 3591(a)(2)(C).

September 11th plot. *See* JA6353-54 ("In fact, the evidence is to the contrary. They cut him out.").

The convictions on the remaining counts – Counts Two (Conspiracy to Commit Aircraft Piracy), Five (Conspiracy to Murder United States Employees), and Six (Conspiracy to Destroy Property) – each fail for similar reasons. With respect to Count 2, the only aircraft seizures set forth in the Indictment were the coordinated attacks on September 11th. With respect to Count 5, the only United States employees contemplated in the Indictment were the Department of Defense employees targeted in the Pentagon on September 11th. Finally, with respect to Count Six, the only destruction of property mentioned in the Indictment was the destruction attendant to the September 11th attacks. *See generally* JA803-32. Without any factual basis to connect Moussaoui to the September 11th attacks, the district court could not properly have accepted the plea on Counts Two, Five, or Six.

Thus, because the district court had no basis for an essential element of each of the six conspiracy counts, the plea was legally insufficient and this Court must vacate the conviction. *See Mastrapa*, 2007 WL 4326946, at **5-8 (vacating

conviction where defendant "protested" the existence of an element of conspiracy, and no other evidence before the court could "fill the gap").[80]

D. THERE WAS NO BASIS FOR VENUE IN THE EASTERN DISTRICT OF VIRGINIA.

For similar reasons – *i.e.*, that the district court, by its own assessment, had no basis for finding a connection between Moussaoui and the September 11th attacks – Moussaoui's conviction is invalid because the district court could not have properly concluded that the Eastern District of Virginia was a proper venue for this case or that Moussaoui waived this constitutional protection.

As noted *supra*, the September 11th attacks were essential to the Government's prosecution of Moussaoui in the Eastern District of Virginia. Article III of the Constitution requires that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3. The Sixth Amendment reinforces that the trial must be in "the State and district wherein the crime shall have been committed." U.S. Const. amend. VI; *see also* Fed. R. Crim. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."). Under these provisions, venue is proper only in a district in which

[80] The district court also should have dismissed Count Four because an unmodified airplane is not a "weapon of mass destruction" as that term is defined in 18 U.S.C. § 2332a (2001). Specifically, in order to be a WMD, an unmodified airplane would have to be a "destructive device" under 18 U.S.C. § 921 (2001). However, an unmodified airplane is neither "designed" nor "redesigned" as a weapon and therefore cannot be a destructive device per § 921(a)(4)(c).

an essential conduct element of the offense took place. *See United States v. Bowens*, 224 F.3d 302, 309 (4th Cir. 2000), *cert. denied*, 532 U.S. 944 (2001). This means that, in a conspiracy case, venue is proper only where some act in furtherance of the conspiracy was committed. *See United States v. Al-Talib*, 55 F.3d 923, 928 (4th Cir. 1995). Here, all of the alleged conduct by Moussaoui himself took place in Minnesota, Oklahoma, and outside of the United States. JA808, 814-15. According to the indictment, the only act to have occurred in the Eastern District of Virginia was the September 11, 2001 attack on the Pentagon. JA824.

While ordinarily venue may be waived by a plea, here the district court did not obtain a knowing and intelligent waiver from Moussaoui. During the Rule 11 colloquy, with respect to the first count, the Court asked "Do you understand that the government would . . . have to prove beyond a reasonable doubt that at least one act in furtherance of the conspiracy occurred in the Eastern District of Virginia?" JA1425. Before Moussaoui could respond, however, the Court interposed a more ambiguous question: "So, for example, *the allegation* that the Pentagon was one of the . . . targets of the conspiracy *would give this Court jurisdiction* over the conspiracy. Do you understand that?" JA1425 (emphases added). Moussaoui responded that he understood that this "allegation" (rather than proof by a preponderance of the evidence) "would" give the Court "jurisdiction." JA1426. Next, addressing Moussaoui regarding counts two through six collectively, the Court included the issue of venue in the middle of a long,

compound question regarding whether Mr. Moussaoui understood the concepts of (1) proof beyond a reasonable doubt; (2) the element of the existence of a conspiratorial agreement; (3) the element of scienter; (4) the concept of venue; and (5) the element of an overt act by (a) Mr. Moussaoui or (b) one of the other numerous co-conspirators. JA1426 ("THE COURT: Do you understand that?"). Moussaoui responded that he understood "that," but the record is unclear as to which of these numerous items he was referring. JA1426.

Thus, for this additional reason – related to the lack of a factual basis for the plea – this Court should vacate the conviction.

E. ABSENT A COMPETENCY HEARING, THE DISTRICT COURT DID NOT HAVE A FACTUAL BASIS TO CONCLUDE THAT THE PLEA WAS KNOWING AND VOLUNTARY.

As set forth above, a district court has an obligation to ensure that a plea is knowing and voluntary. Even a casual reader of the newspaper would likely be shocked to find out that the district court in this case never held a competency hearing. Simply put, this Court should reverse the judgment and vacate Moussaoui's guilty plea because the district court could not have reasonably concluded –without holding a competency hearing– that the plea was knowing and voluntary.

1. Facts Relating to Competency.

a. Moussaoui Requests to Proceed *Pro Se* and the Court Orders a Competency Evaluation.

As noted above, the district court initially requested a competency evaluation in connection with Moussaoui's request to represent himself. JA211-

12. On April 26, 2002, the court appointed Dr. Raymond Patterson to perform a forensic competency evaluation of Moussaoui. JA332-35. Shortly thereafter, Dr. Patterson and experts retained by defense counsel, Drs. Xavier Amador and William Stejksal, submitted their reports. At the time of Dr. Patterson's first report (dated May 23, 2002), Moussaoui had refused to meet with him; thus, that report was based only on a review of *pro se* filings, a transcript of the April 22, 2002, hearing, prison records, jail videos of Moussaoui, and interviews of jail staff. JA5739-44. Dr. Patterson concluded that "there does not appear to be a history or current symptoms consistent with a mental disease or defect that would interfere with [Moussaoui's] voluntary, intelligent, and knowing appreciation of the potential consequences of waiving counsel." JA5758.

The defense experts' reports, submitted on May 31, 2002, detailed Moussaoui's extensive family history of mental illness, as well as other indicators of Moussaoui's incompetence. JA6606-22. The defense experts similarly had not interviewed Moussaoui. *See* JA5762-78.

After meeting with Moussaoui, on June 7, 2001, Dr. Patterson submitted a supplemental report concluding – based on this single meeting – that Moussaoui was competent to proceed *pro se*. *See* JA5786-88. On June 10, 2002, Drs. Amador and Stejskal submitted a supplemental competency report commenting on Dr. Patterson's June 7 report. *See* JA6623-26. Drs. Amador and Stejskal concluded that further evaluation of Moussaoui's competency was needed, noting in particular Dr. Patterson's admission that he was unable to perform a full mental

status examination or to determine whether certain of Moussaoui's statements motivating his desire to proceed *pro se* were based in a delusional process. JA6625-26.

At a hearing on June 13, 2002, the district court heard argument on Moussaoui's competency in connection with his request to proceed *pro se*. JA506, 510-14. The district court did not afford Moussaoui critical procedural safeguards required in a competency hearing under 18 U.S.C. § 4247(d): an opportunity to testify, permit the presentation of evidence or witnesses, or permit cross-examination of Dr. Patterson.[81] JA506, 510-14. The district court chose not to hold a competency hearing and instead found Moussaoui to be competent based solely on Dr. Patterson's report and its own observations of Moussaoui. JA514-16.

b. The Court Re-Examines Competency in Preparation for Attempted Guilty Plea and Fails to Hold Competency Hearing.

At his July 18, 2002 arraignment on the Indictment, Moussaoui stated that he wished to plead guilty. JA858. Shortly thereafter, on July 24, 2002, standby counsel filed a memorandum arguing that the court should re-examine Moussaoui's competency with respect to both his *pro se* status and any guilty plea. *See* JA872-75. The defense competency experts submitted a supplemental report stating that their observations of Moussaoui in court and reviews of his writings indicated that he suffered from mental illness and that his condition had actually

[81] The statute which sets forth requirements for a competency hearing when warranted by 18 U.S.C. § 4241(a).

deteriorated since proceeding *pro se*. JA872-73. Standby counsel recommended a complete competency evaluation. JA873-75.

Again, the district court refused to permit any additional competency evaluation of Moussaoui and found him competent to plead guilty. *See* JA993-94. The court based its opinion in part on the fact that Moussaoui had obeyed her recent admonition against filing repetitive motions. *See* JA993-94. As noted above, the district court rejected Moussaoui's attempt to plead guilty for reasons unrelated to competency. *See supra* at 56.

c. The Court Considers Competency Yet Again in April 2005 and Still Does Not Hold a Competency Hearing.

In connection with another potential plea in April 19, 2005, defense counsel again described to the court the significance of Moussaoui's family medical history, solitary confinement, his questionable competency, and their effect on his ability to knowingly and voluntarily plead guilty. JA6344-45. In this context, the district court stated its position on the issue of competency:

> I recognize that the mental health issues in this case may be significant in the mitigation phase of any trial if we get to that point, but I think it is – it has been absolutely counterproductive to keep focusing on this man as being incompetent. He is strange, he's got a personality we don't like, we have all been the victims of his rhetoric, but he is sharp as a tack. He is completely oriented. I mean, his pleading from yesterday, he's got the right date. He's clear in his thinking process, and although it may be different process, I think what has happened is he is so insulted – and has said this many times in his pleadings – and that you would accuse him of being

> incompetent, that that has gone a long way in driving the wedge between this man and his counsel.

JA6340-41.

On April 20, 2005, the court held an *ex parte* hearing with Moussaoui present, for the purpose of assuring "the Court that this is a plea that is properly, voluntarily, and knowingly made." JA6376. The court asked Moussaoui if he knew the date, and when he did, the court considered that another confirmation of competency. JA6377. After discussing with Moussaoui the apparent contradiction between his complaint that his attorneys were trying to kill him and his stated desire to receive the death penalty, the Court concluded that Moussaoui was competent to enter his plea. JA638-93.

On April 22, 2005, the date of Moussaoui's guilty plea, defense counsel again made an eleventh-hour effort to raise with the court significant concerns about Moussaoui's competency to plead guilty, and submitted another expert report detailing concerns about Moussaoui's ability to enter a knowing and voluntary plea. *See* CJA1237-1355; JA6645-48. The court again found Moussaoui competent to plead guilty. JA1435. The district court declined to revisit the issue of Moussaoui's competency, or even hold a competency hearing, for the remainder of the proceedings below. Thus, at no time did the district court hold a competency hearing.

2. The District Court Erred in Failing to Hold a Competency Hearing.

A district court has an obligation to hold a competency hearing when – among other things – it has reasonable cause to believe that a defendant may suffer

from a mental disease or defect that interferes with his ability to understand the nature and consequences of entering a plea of guilty. 18 U.S.C. § 4241(a); *see also United States v. Damon*, 191 F.3d 561, 564 (4th Cir. 1999) ("Before a court may accept a guilty plea, it must ensure that the defendant is competent to enter the plea.") (citing *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993)); *Robert M. Brady*, 397 U.S. at 748 (guilty pleas "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and the likely consequences").

Among other things, a district court should consider the following factors when deciding whether to hold a competency hearing: (1) whether a psychiatric or psychological evaluation of the defendant was conducted, *United States v. Pellerito*, 878 F.2d 1535, 1545 (1st Cir. 1989), (2) evidence of irrational behavior, (3) defendant's demeanor in court, and (4) any other medical opinions or evidence concerning competency. *See United States v. General*, 278 F.3d 389, 397 (4th Cir. 2002); *United States v. Mason*, 52 F.3d 1286, 1290 (4th Cir. 1995). "The trial court must 'look at the record as a whole and accept as true all evidence of possible incompetence.'" *Mason*, 52 F.3d at 1290 (quoting *Smith v. Ylst*, 826 F.2d 872, 877 (9th Cir. 1987), *cert. denied*, 488 U.S. 829 (1988)).

Under the circumstances of this case, the court was required to hold a competency hearing before permitting Moussaoui to plead guilty. Accepting as true all evidence of possible incompetence – including (1) Moussaoui's personal medical and family history of mental illness, (2) opinions submitted by defense

competency experts, and (3) the fact that Moussaoui had been in solitary confinement for several years by the time of the plea – the district court should have held a competency hearing. Indeed, the district court did not have a sufficient basis to find the plea knowing and voluntary without holding one.

a. Moussaoui's Family Medical History and the Defense Expert Reports Justified a Competency Hearing Prior to Acceptance of Moussaoui's Guilty Plea.

At the outset, Moussaoui's own medical history supported a competency evaluation. Indeed, as far back as 1989, he was exempted from mandatory national military service in France in part based on the evaluating doctor's assessment of psychiatric problems. *See* CJA29; CJA37. This kind of objective, pre-indictment evidence is strongly indicative of the need for a hearing in this case.

Further, the record before the district court showed a family history of mental illness that warranted further inquiry. Among other things:

- Moussaoui's father had been hospitalized for psychiatric treatment. JA5773.
- Moussaoui's sister Nadia had been diagnosed with manic depression and has had multiple psychiatric commitments. JA5773.
- Moussaoui's sister Djamila has been diagnosed with schizophrenia and has had approximately fifteen psychiatric commitments. JA5773.
- Moussaoui's brother Abd-Samad also has been committed for psychiatric treatment. JA5773.

This objective evidence supported the need for a competency hearing here as a "history of schizophrenia in just one first-degree family member raises one's risk of developing the disorder ten-fold (from only 1% to approximately 10%)." JA5773.

Moreover, the defense experts prepared a number of competency reports, including one at the time of the plea, detailing facts and evidence giving rise to concerns about Moussaoui's competence. *See* JA6571-96; JA6606-48. These reports, taken together with the other evidence before the court at the time of Moussaoui's guilty plea, at least justified holding a competency hearing.

b. Four Years of Solitary Confinement Heightened the Need for a Competency Hearing.

There is no doubt that solitary confinement may have an adverse effect on a defendant's mental state; indeed courts have found that pretrial solitary confinement is capable of breaking a defendant's free will. [82] *See, e.g., Davis v. North Carolina*, 384 U.S. 737, 742 (1966) (holding that confessions obtained after

[82] *See also Hutto v. Finney*, 437 U.S. 678, 688 (1978) (affirming injunction imposing thirty-day limit on isolation); *Panetti v. Quarterman*, 127 S. Ct. 2842, 2852 (2007) (noting that "[a]ll prisoners are at risk of deteriorations in their mental state"); *Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir. 1988) (noting "plenty of medical and psychological literature concerning the ill effects of solitary confinement"); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972) ("We cannot approve of threatening an inmate's sanity and severing his contacts with reality by placing him in a dark cell almost continuously day and night."); *McClary v. Kelly*, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998) ("[The notion that] prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science.").

sixteen days of isolation "were the product of a will overborne"); *Ledbetter v. Warden*, 368 F.2d 490, 492-93 (4th Cir. 1966) (holding that confession was involuntary where accused was held in a small room and prevented from contacting his family).

Here, by April 22, 2005, Moussaoui had been held in solitary confinement for some forty-four months without a trial. At several points, defense experts, and Moussaoui cautioned the courts that solitary confinement was eroding Moussaoui's mental state. For example, prior to the plea, defense counsel reminded the court that Moussaoui had "been in isolation for over three years" and warned that "continued isolation, confinement of the sort he's been under" had undermined Moussaoui's ability to plead. *See* JA6344-45.

Further, during the "dress rehearsal," Moussaoui's statements verify that solitary confinement was affecting his mental state: "I have been completely silenced, and these people are not representing me. I have, I have no contact with the outside world, okay?" JA6396.

Similarly, on the day of the plea, defense counsel reiterated that Moussaoui had been "cut off from virtually any contact with the outside world," spent a year in a windowless cell, and, for a time, had been held in a cell where "the lights were on constantly." CJA1250. They filed an expert report of detailed findings that, as early as 2002, Moussaoui's "mental state ha[d] declined as a result of his prolonged confinement in isolation." CJA1303

Moussaoui similarly explained:

> I have not a chance to have my voice being speak because they know that ***I've being held in this cave, in Alexandria Detention cave***, and nobody speaking for Moussaoui, okay? And this is my last time, I'm sure, that I have the opportunity because I am not my lawyer.

JA1443-44 (emphasis added).

3. The District Court's Failure to Hold a Competency Hearing Warrants Vacatur of the Guilty Plea and Remand.

"[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *See Drope v. Missouri*, 420 U.S. 162, 172 (1975) (citing *Pate v. Robinson*, 383 U.S. 375 (1966)). Here, the district court's procedures were "not adequate for reaching reasonably correct results," or at the very least resulted in a process that appeared to be "seriously inadequate." *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2859 (2007) (quoting *Ford v. Wainwright*, 477 U.S. 399, 423-24 (1986)) (stating there is no presumption of correctness to lower court's competency findings when the court's competency inquiry procedures were inadequate). Indeed, the Supreme Court recently warned that finding a defendant competent "solely on the basis of the examinations performed by" a court-appointed psychiatrist, without a proper hearing, rebuttal, or cross-examination, constitutes "precisely the sort of" deficient adjudication that "invite[es] arbitrariness and error," in violation of Due Process. *Id.* at 2856 (internal quotation marks omitted).

Where there is reasonable cause to believe that the defendant may be incompetent, a court must hold a competency hearing. *See Mason*, 52 F.3d at

1293. In *Jones* for instance, the Third Circuit vacated a judgment and remanded a criminal conviction where – as here – a district court incorrectly decided not to hold a competency hearing based solely on its observations of the defendant and a single competency evaluation. *See United States v. Jones*, 336 F.3d 245, 259-60 (3d Cir. 2003); *see also Mason*, 52 F.3d at 1293 (remanding to the district court for its failure to hold a competency hearing); *United States. v. Masthers*, 539 F.2d 721, 730 (D.C. Cir. 1976) (holding that a competency hearing is "essential whether the issue is competency to stand trial, withdrawal of a plea, criminal responsibility or sentencing."); *United States v. Moore*, 464 F.2d 663 (9th Cir. 1972) (lack of competency hearing was due process violation, resulting in vacatur of guilty plea).

Here, as in *Jones*, there was sufficient evidence of incompetence to give rise to reasonable cause for a hearing. *See, e.g., Pate*, 383 U.S. at 385-86 (the fact that the defendant appeared competent, alert, and understanding "offer[ed] no justification for ignoring" other evidence of incompetence). The district court here was required to hold a competency hearing before it accepted a plea. In the totality of the circumstances, there was no factual basis here to conclude that the plea was knowing and voluntary; accordingly, the court should vacate the plea.

F. THE DISTRICT COURT MISINFORMED MOUSSAOUI ABOUT THE SENTENCES HE FACED; AS A RESULT, MOUSSAOUI'S PLEA WAS NOT MADE KNOWINGLY.

Before and at the time Moussaoui entered his plea, the district court informed him that there were only two sentencing options available if he was convicted of the charges he faced: (1) life imprisonment and (2) the death penalty.

See, e.g., JA523-24[83]; JA1420-24. This was clearly incorrect; for each statute at issue, Moussaoui actually also had available the sentence of a term of years.

Faced with what he believed was a binary choice: life or death, Moussaoui made the decision to enter a plea and focus on saving his own life. Under these circumstances, Moussaoui's plea was simply unknowing. The district court should have informed Moussaoui that, even if he went to trial and was convicted, there were circumstances under which he could get a term of years.

1. A Term of Years Was an Available Sentencing Option During Phase II of the Death Penalty Proceedings.

None of the three death-eligible counts carried a mandatory minimum sentence of life imprisonment. Rather, each of the three counts had available sentences of imprisonment of a term of years – even after a finding that a death resulted from the offense.

It appears that the district court erred in concluding that Count III imposed a mandatory minimum of life imprisonment.[84] Count Three (Conspiracy to Destroy

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[83] "THE COURT: All right. They actually carry two possible penalties . . . . If convicted of any or all of those offenses, you are looking at either life imprisonment without the possibility of parole or the death penalty. Do you understand that?" JA524.

[84] Count Three is the only possible source of the district court's error. There is no basis for confusion in the remaining counts. For Count One (Conspiracy to Commit Acts of Terror), the statutory penalty "for a killing, or if death results to any person from any other conduct prohibited by this section," was "death, *or by imprisonment for any term of years* or for life." 18 U.S.C. § 2332b(c)(1)(A) (2001) (emphasis added). For Count Four (Conspiracy to Use Weapons of Mass Destruction), the punishment where "death results" was "death or imprison[ment] *for any term of years* or for life." 18 U.S.C. § 2332a(a) (2001) (emphasis added).

Aircraft), 18 U.S.C. § 32(a) (2001), provides for a "fine[] . . . or imprison[ment of] not more than twenty years or both." Where a death has resulted, 18 U.S.C. § 34 makes the death penalty and life imprisonment available in addition to, and not in place of, the fine and term of years available under 18 U.S.C. § 32(a) 2. Specifically, 18 U.S.C. § 34 states that, if the offense "has resulted in the death of any person," then the defendant "shall be subject ***also*** to the death penalty or to imprisonment for life." *Id.* (emphasis added).

"In determining the scope of a statute," a court must "look first to its language." *United States v. Turkette*, 452 U.S. 576, 580 (1981). "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Id.* (internal quotation marks omitted). The plain meaning of "also" is "in addition." Black's Law Dictionary 77 (6th ed. 1990); Webster's Third New International Dictionary Unabridged 62 (1981). Read together, Section 32(a) provides that an offender can be punished by a term of years, and Section 34 provides that, if a death resulted, life imprisonment or death are "also" available sentences. The district court thus improperly read the word "also" out of the statute. *See United States v. Goltz*, 187 F. Supp. 2d 1168, 1170 (D.S.D. 2002) (interpreting nearly identical language in 18 U.S.C. § 1992, and reasoning that "[i]f a life imprisonment sentence is mandatory, there would be no reason to say the person convicted of the crime is 'subject *also* to the death penalty or imprisonment for life' because there

would not be any other options for the sentencing court in addition to the death penalty or life imprisonment").[85]

If there were any doubt as to the meaning of Section 34, and there is not, the rule of lenity dictates that this Court should construe the statute in Moussaoui's favor. *See United States v. Horton*, 321 F.3d 476, 479 (4th Cir. 2003) (faced with "ambiguity or uncertainty in the meaning of the statute, the rule of lenity requires us to adopt the construction most favorable to the defendant") (internal quotations omitted); *Goltz*, 187 Supp. 2d at 1183-84 (holding that the rule of lenity required a conclusion that nearly identical language in 18 U.S.C. § 1992(b) did not impose a minimum sentence of life imprisonment).

[85] That Section 34 provides ***additional*** sentencing options when certain crimes result in a death, rather than setting a mandatory minimum of life imprisonment, is further demonstrated by certain amendments enacted in the Violent Crime Control and Law Enforcement Act of 1994. Pub. L. No. 103-222, § 60003(a)(1), 108 Stat. 1796 (1968). In this legislation, Congress amended certain provisions of Section 34, but left the phrase "shall be subject also to" intact, while adding binding language to create mandatory minimums to several other provisions of Title 18. *See* § 60003(a)(9), 108 Stat. at 1969 (amending 18 U.S.C. § 2113(e) by replacing, "or punished by death if the verdict of the jury shall so direct," with, "or if death results ***shall be punished by death*** or life imprisonment." (emphasis added)); *id.* at (a)(6), (a)(10) (amending Sections 1201(a) and 1203(a) by adding, "and, if the death of any person results, ***shall be punished by death*** or life imprisonment." (emphasis added)); § 70001(2), 108 Stat. at 1982-84 ("[A] person who is convicted in a court of the United States of a serious violent felony ***shall be sentenced to*** life imprisonment if . . . ." (emphasis added)).

2. The Incorrect Advice on the Available Sentences Requires Vacatur of the Plea.

This Court must vacate Moussaoui's plea because the incorrect information the district court provided Moussaoui regarding the range of sentences renders it unknowing and involuntary. Courts consider guilty pleas voluntary and intelligent only if the defendant "understands the consequences of the plea," *Hammond v. United States*, 528 F.2d 15, 17 (4th Cir. 1975), including "a ***complete*** understanding of the possible sentence," *Manley v. United States*, 588 F.2d 79, 81 (4th Cir. 1978) (emphasis added) (citation omitted); *see also Wilson v. McGinnis*, 413 F.3d 196, 199 (2d Cir. 2005) (knowing and voluntary plea requires "full awareness of its 'direct consequences,'" including "the range of the defendant's punishment" (citations omitted)).

A plea is unknowing and involuntary where, as here, the defendant was never apprised of each of the possible sentencing options. *See Wilkins v. Bowersox*, 145 F.3d 1006, 1015 (8th Cir. 1998) (plea was not knowing and voluntary where "the court did not explain the full range of [other] potential sentences Wilkins could receive. The court limited its discussion of sentences to the death penalty and life imprisonment without parole."); *Coleman v. Alabama*, 827 F.2d 1469, 1473 (11th Cir. 1987) (guilty plea not knowing and voluntary where "[o]ne of the options available to Coleman of which he – and apparently everyone else involved – was unaware was his right to request youthful offender consideration. With all the benefits of the Youthful Offender Act and particularly

the privilege of not being sentenced as an adult, Coleman was certainly entitled to know that he had the possibility of these favorable options available to him.").

In *Wilkins*, the court informed the defendant that he faced life in prison without the possibility of parole or the death penalty if he pleaded guilty, when "other potential sentences" were in fact available to the defendant. 145 F.3d at 1015. Faced with this binary choice, the defendant opted to seek the death penalty by waiving the presentation of mitigating evidence because, although "he did not absolutely wish for the death penalty," he "preferred it over spending the rest of his life in prison." *Id.* Because the lower court "did not explain the full range of sentences that Wilkins could receive," *id.*, the Eighth Circuit held that the defendant's guilty plea was not "'a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Id.* (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)).

In *Coleman*, the defendant pleaded guilty to several charges. 827 F.2d at 1471. Two of the crimes occurred when the defendant was young, and he was not informed at the time of the plea that he had rights under the Alabama Youthful Offender Act. *Id.* at 1470. The Eleventh Circuit found his plea to be unknowing and involuntary, reasoning that "[o]ne of the most lasting effects of a defendant's plea of guilty is the ***type and term*** of sentence he may receive and the lasting effects of that sentence," *id.* at 1473 (emphasis added), and that an accused has the "constitutional right to have full knowledge of exactly what rights he waive[s] by his guilty plea." *Id.* at 1474.

Here, Moussaoui was unaware that a term of years was a possible sentence. The district court's error is plain in the record, not only from the Rule 11 colloquy, but from virtually the beginning of the case.[86] Moussaoui could not have made a knowing and voluntary plea. *Alford*, 400 U.S. at 31 (guilty plea must be a "voluntary and intelligent choice among the alternative courses of action open to the defendant"). Accordingly, this Court should vacate the plea.

III. THIS COURT MUST VACATE THE FINDING OF DEATH ELIGIBILITY.

There were a number of errors in connection with the sentencing phase that affected Moussaoui's sentence. As a result, if this Court does not vacate the plea, it should remand the case for re-sentencing.

Prior to and at the time of the plea, the district court had informed Moussaoui that his only two sentencing options under the charged counts were life imprisonment or the death penalty. JA523-24; JA1420-24. After the plea, the court put only those two options before the jury. JA1589. At Phase I, the jury found Moussaoui to be death eligible. JA4397-98. Then, after the jury declined to impose the death penalty, the district court was legally bound under 18 U.S.C. § 3594 to enter a life sentence as a result of the jury's verdict and the finding of death eligibility. As a result, the district court imposed that sentence. JA5604-05.

[86] "THE COURT: All right. They actually carry two possible penalties . . . . If convicted of any or all of those offenses, you are looking at either life imprisonment without the possibility of parole or the death penalty. Do you understand that?" JA524.

To understand why the errors below are important, a brief summary of what *should* have happened at sentencing is helpful. First, there should have been three options available at sentencing: (1) life imprisonment; (2) death; or (3) a term of years. Second, for the reasons set forth below, Moussaoui should have been found ineligible for the death penalty at the conclusion of Phase I. If the jury had found that Moussaoui was not death eligible, the result would have been that the district court would have had discretion to impose a reasonable prison sentence. *See Gall v. United States*, 128 S. Ct. 586, 594-96 (2007) (court has discretion to make an individual sentence assessment based on facts). Thus, errors in the sentencing phase prejudiced Moussaoui because, if not for the jury's erroneous finding, his sentence on each count would have been within the discretion of the district court, with the option of a term of years under each count.[87]

In this context, this Court should remand for re-sentencing in light of the important errors set forth below.

A. THERE WAS INSUFFICIENT EVIDENCE THAT MOUSSAOUI'S LIES DIRECTLY RESULTED IN A DEATH.

On October 3, 2005, defense counsel requested that the court hold a separate hearing for the threshold factor of death eligibility. CJA1496-1518. On November 14, 2005, the court ordered that the penalty phase of the case be bifurcated into two

[87] Moreover, under the charges to which he pled, with no finding that his conduct directly caused a death, Moussaoui could have been eligible for a term of years on each count.

distinct hearings – one to determine if Moussaoui was statutorily eligible for the death penalty, and, if so, the second to determine his sentence. JA1472-74.

1. Facts Relevant to Phase I of the Sentencing Proceedings

Under the applicable subsection of the Federal Death Penalty Act (FDPA), a defendant is eligible for the death penalty only if he engaged in an act that "direct[ly] result[ed]" in the death of another. 18 U.S.C. § 3591(a)(2)(C). At Phase I of the sentencing trial, the Government alleged that Moussaoui was eligible for the death penalty under the following theory:

(1) Moussaoui lied when he was arrested on immigration violations; [88]

(2) ***If*** he had told the truth when arrested, he ***would have*** admitted each of the items that appeared in the Statement of Facts to which Moussaoui agreed on April 22, 2005 ("4/22/05 SOF") (JA1409-1413);

(3) ***If*** Moussaoui had admitted everything in the 4/22/05 SOF, the FBI could have investigated each of the avenues it investigated after September 11th and thereby identified eleven of the nineteen September 11th hijackers;

(4) ***If*** the FBI had identified eleven of the September 11th hijackers, it could have passed that information to the Federal Aviation Administration (FAA), which could have taken measures that could have prevented the hijacking of at least one plane.

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[88] The Government's theory is highly speculative and assumes that the only alternative to Moussaoui saying what he said at the time of his arrest was telling "the truth." On the contrary, it was as likely that Moussaoui would have asserted his Fifth Amendment rights, as he later did.

a. What Moussaoui Said When He Was Arrested and What He Would Have Said if He Had Told the Truth

The first link in the Government's hypothesized causal chain was Moussaoui's arrest on immigration charges in August 2001; the following summarizes the evidence submitted at Phase I of the penalty trial.

After two interviews with the arresting FBI Agent Harry Samit, Moussaoui invoked his right to counsel. JA2411. At that point, Samit believed that Moussaoui was a terrorist who was getting flight training. JA2885-86. Samit wanted to search Moussaoui's bags and his apartment in Norman, JA2426, but at the time Samit was unaware that Moussaoui was a member of al Qaeda because Moussaoui had offered other explanations for his presence in the United States and his flight training. JA2381-82, 2394, 2397. Moussaoui also made a number of other statements that were inconsistent with the 4/22/05 SOF. *See, e.g.*, JA2402-07. Based on the information Samit knew in mid-August, he could not obtain the FBI's permission to apply for a warrant from the FISA court. JA2416-17. Indeed, even after learning information linking Moussaoui to Islamic fundamentalists and bin Ladin, Samit still could not convince his superiors that there was a connection between Moussaoui and a foreign power or terrorist group, which was necessary for a FISA warrant, and his superiors still would not approve pursuit of a criminal warrant application. JA3039-40. Between Moussaoui's arrest in mid-August and September 11th, Samit sent his superiors seventy notes relating to Moussaoui, describing him as a terrorist and a radical Muslim. JA2891.

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On September 5, based on Samit's investigation and Moussaoui's statements, the FBI notified the FAA and other government agencies about a possible plan to hijack a commercial airliner. JA2437-38. On September 10, Samit received permission to have Moussaoui deported to France, where French officials would search his baggage. JA2436-37. This plan was canceled after the September 11th attacks; a search warrant was issued immediately, and Samit's team searched Moussaoui's bags. JA2437-41; JA2443-72. During his testimony, Samit identified information the FBI found in Moussaoui's bags that Samit later claimed could have led to the identification of eleven of the nineteen hijackers. JA5591; JA2452-53.[89]

The Government contended at Phase I of the penalty trial that, had Moussaoui not lied prior to invoking his right to counsel, Samit would have asked "questions that would have gathered all of that information that [Moussaoui] ultimately gave in the Statement of Facts" associated with his guilty plea.[90] JA2399, 2402-11.

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[89] One bag held a notebook in which was written the name "Ahad Sabet" and two German phone numbers, one a fax number. JA5591; JA2452-53. The bag also contained a Western Union receipt dated August 4, 2001, for a money transfer to Moussaoui in Shawnee, Oklahoma, from Sabet for $4,063.25. JA5592A-92B; JA2471-72. Sabet was a U.S. citizen whose passport and identification had been stolen while on vacation in Spain. He was not the individual involved in these wire transfers. JA3529-30.

[90] The defense objected that this use of the 4/22/05 SOF was speculative and inappropriate on various grounds, including the fact that trial evidence contradicted the Statement. JA2399-2402; JA3784-87.

b. What the FBI Could Have Done

The Government sought to prove that, if the FBI had been told the information that Moussaoui ultimately admitted in the 4/22/05 SOF, they could have carried out precisely the investigation that the FBI conducted after September 11th and could have been able to identify eleven of the nineteen hijackers before September 11th through, among other things: (1) phone and wire transfer records; (2) the records of the flight schools and interviews of personnel; (3) apartment, motel, and hospital records; (4) commercial passenger flight records; (5) multiple state motor vehicle records; and (6) interviews with one suspect (Moussaoui's traveling companion, al-Attas). *See* JA3508-87.

This trial evidence consisted of testimony that, among other things: (1) a name on a sheet of paper from Moussaoui's belongings could have permitted the FBI to subpoena Western Union records, JA3512-13; (2) the FBI then could have launched the same investigation that it ultimately conducted after September 11th, JA3512-87; (3) if Moussaoui had revealed that he had received information on flight schools in the United States from an al Qaeda associate and, while in Malaysia in September 2000, had contacted the Airman Flight School in Norman, Oklahoma, the Government could have been able to identify a number of the hijackers before September 11th, JA3591-3606; and (4) that the FBI could have shared all this information with the various intelligence and law enforcement agencies as well as with the FAA prior to September 11th, JA3587-88.

stand during Phase I of the penalty phase and testified, among other things, that he was scheduled to pilot an airplane into the White House during the September 11th attacks. JA3878-94. He also testified that Richard Reid, the so-called "Shoe Bomber," was to have been a member of his crew. JA3878-94. Moussaoui said he was assigned to the September 11th attacks by bin Ladin and that he lied to the FBI at the time of his arrest so that his "al Qaeda brothers" could proceed with the attacks. JA3878-94.[97] Moussaoui nonetheless acknowledged that he had no way to contact any future crew members (whoever they might be), and he had no contact person in the U.S. JA3878-79, 3954, 3980-81. He said he had no contact with any of the nineteen hijackers in the United States, JA3886, and at the time of his arrest, he did not know if Reid was even in the U.S. JA3878-79. He never flew on any U.S. airliners to prepare for his mission or to observe airline procedures, JA3954, and he never knew the precise date of his mission. JA3880. He said he thought the attacks would occur after August 2001, and that the World Trade Center, along with the White House, would be targets.[98] JA3880, 3889.

[redacted]

[97] In Phase II, Moussaoui testified that he was not to be part of September 11th and was not to be the "20th hijacker." JA4504-07.

[98] Neither the jury nor the Government believed Moussaoui's testimony. For instance, on the verdict form, three jurors found as a mitigating fact that Moussaoui had limited knowledge of September 11th. JA6740.

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g. Jury Instruction and the Finding of Death Eligibility

At the conclusion of all the evidence, the defense renewed the motion for a judgment of acquittal on the death eligibility factor. JA4277. The district court again denied the motion. JA4277.

The court instructed the jury on the threshold factor, in relevant part:

> [Y]ou must determine whether the defendant, Zacarias Moussaoui, intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants to the offense, and, that at least one of the victims of September 11 died as a direct result of the act.
>
> ***
>
> The term 'result' means 'as a consequence or outcome of an act,' and that [*sic*] the term 'direct' means 'proceeding in a straight course with nothing intervening, an uninterrupted line or course.' An event or occurrence can be the direct result of more than one act.

JA4367, 4372.

On April 3, 2006, the jury found that, as to Counts One, Three, and Four, Moussaoui was eligible for the death penalty. JA4405-08.

Footnote continued from previous page

[redacted] during Phase II, the Government stipulated to facts about Reid that contradicted Moussaoui's Phase I testimony. *See* JA5237A-37C.

Consistent with all of the above, Moussaoui admitted – in an affidavit filed in support of his motion to withdraw his guilty plea – that he lied during his trial testimony. JA5620-75.

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2. The FDPA Requires Proof of Direct Causation.

The jury's finding that Moussaoui was eligible for the death penalty was not supported by the evidence. To establish that Moussaoui was death eligible under the FDPA, the Government had to prove, beyond a reasonable doubt, that he

> intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and ***the victim died as a direct result*** of the act[.]

18 U.S.C. § 3591(a)(2)(C) (emphasis added.)[99] Under the Government's theory, Moussaoui's lies at the time of arrest were collectively the "act" that allegedly "directly resulted" in a death from the September 11th attacks. *See* JA803-32. The Government argued that it could have stopped the hijacking of at least one plane if Moussaoui had told the truth. JA4296.

Viewing the evidence in the light most favorable to the Government, the Government proved, at most, that Moussaoui's lies speculatively and indirectly

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[99] *Compare* § 3591(a)(2)(C) (the FDPA's "direct result" requirement) *with* 21 U.S.C. § 848(n)(1)(C) (establishing as an aggravating factor conduct "*which resulted* in the death of the victim" (emphasis added)). Section 848 is a provision of the "Continuing Criminal Enterprise" (or "CCE") statute, which predates the FDPA. Even under the lower standard contained in the CCE statute, death eligible conduct has typically been far more "direct" than the Government's theory in this case. *See, e.g.*, *United States v. Flores*, 63 F.3d 1342, 1372-73 (5th Cir. 1995) (defendant furnished the murder weapon, instructed the gunman and drove him to the scene); *United States v. Beckford*, 968 F. Supp. 1080, 1087-88 (E.D. Va. 1997) (defendant instructed the gunman). The FDPA strengthens the causation requirement by requiring a "direct" link between the defendant's conduct and the victim's death.

caused a death on September 11th. Because this is insufficient to satisfy the FDPA's requirement of "direct" causation, this Court should vacate the sentence and order a re-sentencing.[100]

For several reasons, the trial evidence did not and could not meet the FDPA's mandatory "direct result" test. "In determining the scope of a statute," a court must "look first to its language." *United States v. Turkette*, 452 U.S. 576, 580 (1981). "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Id.* (internal quotation marks omitted). In that vein, Merriam-Webster's defines "direct" as:

> **a:** from point to point without deviation : by the shortest way **b:** from the source without interruption or diversion **c:** without an intervening agency or step.

Merriam-Webster's Online Dictionary ("direct.")(2007), *available at* www.m-w.com (last visited Jan. 15, 2008). And, Merriam-Webster's defines "result" as:

> **1 a**: to proceed or arise as a consequence, effect, or conclusion **b**: to have an issue or result.

Id. ("result.") In other words, the deaths in the September 11th attack had to "arise," "without deviation," "by the shortest way" and "as a consequence" of Moussaoui's lies.

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[100] Further, Samit never believed Moussaoui's lies, concluded he was a terrorist, and diligently pursued his investigation of an aviation plot. JA2411-13.

We have found no cases interpreting the "direct result" language under the FDPA. Nor have we found any FDPA case in which the Government sought the death penalty under anything like the theory here – *i.e.*, that, if the defendant had told the truth, the Government could have conducted a different investigation, discovered other participants in an alleged conspiracy, and stopped those other persons from engaging in actions that resulted in the deaths of others. The published cases discussing Section 3591(a)(2)(C) plainly involve conduct that resulted directly in a death – as opposed to the speculative, remote, and indirect causal link suggested here – and therefore provide a strong contrast to the Government's theory in this case. *See, e.g.*, *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999) (defendant arranged the murder of a fellow police officer by drug dealers that the defendant had been protecting); *United States v. Higgs*, 353 F.3d 281, 290 (4th Cir. 2003) (defendant gave shooter gun, concocted murder plan, drove shooter and victims to remote location, and was present at the shooting), *United States v. Paul*, 217 F.3d 989, 997-98 (8th Cir. 2000) (defendant either shot victim or aided and abetted co-defendant who shot victim). These cases make clear that under the FDPA, the focus must be on the conduct by the defendant and the causal connection between that defendant's specific acts and the death.[101]

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[101] The Government's theory of "direct" causation – and therefore death eligibility – was also flawed in assuming that, if Moussaoui had not lied to Samit, then Moussaoui would have told Samit all of the facts set forth in the 2005 plea Statement of Facts. JA2399-2412. Moussaoui, of course, had no duty to confess. *See Brogan v. United States*, 522 U.S. 398, 404 (1998).

Although there are no cases interpreting the "direct result" language under the FDPA, there are instances in which courts have applied similar language, and, under those cases, Moussaoui would not be eligible for the death penalty. For example, in *United States v. Regan*, 221 F. Supp. 2d 666 (E.D. Va. 2002), the defendant, charged with attempted espionage, was death eligible only if the materials involved "directly concerned" certain highly classified materials. In that context, the Eastern District of Virginia's interpretation of "directly concerned" would invalidate the death eligibility finding here:

> The commonsense meaning of the terms "directly concerned" is clear. The dictionary defines the adverb "directly" as "straightforward" or "without intervening persons, conditions, or agencies." *The American Heritage Dictionary* 400 (2d College ed. 1991). The dictionary defines "concern" as "to pertain or relate to." *Id.* at 304. Under the plain "directly concerned" language of section 794(a), the jury must determine whether the information Defendant allegedly sought to transmit was related to one of the national security issues listed in a straightforward manner. . . .

Id. at 671 (footnote omitted).

3. The Evidence Was Insufficient to Establish that Moussaoui's Lies Directly Resulted in Even One Death.

Even when the evidence is viewed in the light most favorable to the Government, Moussaoui's lies did not *directly* result in the death of even one victim of the September 11th attacks. The district court thus erred when it failed to grant a directed verdict as to death eligibility in Moussaoui's favor at the close of

Given that the Government had no evidence of Moussaoui's direct participation in or knowledge of the September 11th attacks, the Government's case instead relied on three speculative steps to prove the "direct result" under Section 3591(a)(2)(C):

First, the Government speculated that if Moussaoui had not lied, he would have spoken to FBI agents ***and*** admitted to everything that was contained in the Statement of Facts.

Second, the Government speculated that had Moussaoui disclosed those facts, the FBI could have ultimately identified eleven of the nineteen hijackers. *See supra* at 182-183.

Third, the Government sought to establish that the FBI could have passed the names of the eleven hijackers on to the FAA, which, in turn, could have imposed security measures that could have prevented at least one hijacking on September 11th. As three of the four pilots were included in those eleven names, the Government speculated that at least one pilot hijacker could have been kept off a plane on September 11th, with the result that at least one death could have been prevented.

Even assuming that the Government proved each of these steps, the evidence was still insufficient to find Moussaoui death eligible. The Government's theory reads the words "direct result" out of the statute; indeed, it is difficult to conceive of an "act" that more indirectly caused a death. Moussaoui's lies were not the equivalent of the phone call to the contract killer directing him to shoot the victim.

See Causey, 185 F.3d at 412. Nor were Moussaoui's lies the same as giving a gun to the shooter, driving him to the victim's location, ordering him to kill the victim, and then leaving before the murder took place. *See Flores*, 63 F.3d at 1372-73; *see also Higgs*, 353 F.3d at 290. Moussaoui's connection to any victim's death was either simply non-existent, speculative, or too remote to satisfy Section 3591(a)(2)(C).

Congress clearly did not intend for the federal government to begin executing defendants based on speculation that a death could have been prevented by law enforcement if that defendant had not lied in the course of an investigation. This theory would permit the Government to seek the death penalty against every member of any organized crime syndicate where the syndicate's activity – indeed, any member's activity – resulted in a death. If any member lies about membership in the syndicate before the crime occurs, the Government could surely find a basis to speculate that it would have stopped the crime if only the members had told the truth.

Moussaoui's trial testimony does not undermine this conclusion. At the outset, Moussaoui's testimony was plainly incredible, as witnessed by the jury's ultimate decision on sentence. But even if taken as true, there was still insufficient evidence to find direct causation. Moussaoui essentially testified that he had been selected to pilot a fifth plane into the White House, assisted by Richard Reid. JA3878-94. Even if that were true, and Moussaoui lied to the FBI at the time of his arrest, those lies still could not have been the direct cause of the deaths on

September 11th. There were simply too many intervening steps between the act – *i.e.*, the lies – and the deaths in the attacks on September 11th. At best, this evidence shows a speculative and indirect cause of the attacks.[102]

On these facts, no rational juror could have found the threshold death eligibility factor beyond a reasonable doubt. The district court therefore erred when it failed to grant the defendant's motion for a judgment of acquittal at the conclusion of the Phase I evidence. JA4277.[103]

B. ALTERNATIVELY, THE FDPA IS UNCONSTITUTIONAL AS APPLIED.

The Government's theory of death eligibility, if upheld, would also render the FDPA unconstitutional as applied to this case. As set forth below, the FDPA seeks to ensure that imposition of the death penalty comports with the Eighth Amendment, under which there must be proof of individualized culpability and major participation in the underlying felony. The FDPA requires a jury to focus on a defendant's personal act and the connection between that act and the death at issue. Here, the Government's theory of death eligibility – that Moussaoui's lies

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[102] As then National Security Advisor Condoleezza Rice testified, there was no "silver bullet" that would have prevented the attacks. *See* JA4164.

[103] While the jury unanimously found this threshold factor in Phase I, in Phase II the jury failed to find as a non-statutory aggravating factor that Moussaoui's actions "resulted in the deaths of approximately 3,000 people." JA6733. Three jurors found as a mitigating factor that Moussaoui "had limited knowledge of the 9/11 attack plans." JA6740.

directly resulted in a death in the September 11th attacks – does not comport with the Eight Amendment.

The Eighth Amendment bar against cruel and unusual punishment also precludes punishments that are "excessive" in relation to the crime committed. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *accord Weems v. United States*, 217 U.S. 349, 371 (1910). Specifically, under the Eighth Amendment, a punishment is unconstitutional if it is "grossly out of proportion to the severity of the crime." *Gregg*, 428 U.S. at 173.[104]

The jury's finding extended the concept of death eligibility to a new and unconstitutional height: holding death-eligible those minor participants in a conspiracy whose "act" for purposes of the FDPA was failing to admit membership in a group where certain other members were involved in a conspiracy to commit murder. This expansion of death eligibility plainly runs afoul of the Eighth Amendment. As the district court previously recognized, there does not exist "a single case in which a remote or minor participant in an alleged conspiracy, who is charged only with conspiracy, was sentenced to death." *United States v. Moussaoui*, 282 F. Supp. 2d. at 485-6 n.20 (E.D. Va. 2003); *see also Fuller v. Dretke*, No. 1:03CV1416, 2005 WL 4688015, at **5-6 (E.D. Tex. Jan. 4, 2005) (recognizing that defendant could not receive the death penalty for

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[104] While the proportionality requirement has been called into question in non-capital cases, it remains in full force in the context of the death penalty. *United States v. Kratsas*, 45 F.3d 63, 66 (4th Cir. 1995) (citing *Harmelin v. Michigan*, 501 U.S. 957, 985-86, 994 (1990)).

merely participating in a conspiracy to kidnap and/or rob the victim); *cf. United States v. Bin Laden*, 109 F. Supp. 2d 211, 213 (S.D.N.Y. 2000) (defendants who were charged only with conspiracy in cases involving 1998 bombings of United States embassies did not face the death penalty, although the embassy bombings resulted in over 200 deaths). "In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry." *Jones v. United States*, 527 U.S. 373, 381 (1999) (citing *Buchanan v. Angelone,* 522 U.S. 269, 275 (1998)).

In this vein, the Supreme Court has developed a doctrine that permits death eligibility only in limited circumstances when the defendant did not physically cause the death at issue. Specifically, for a defendant that did not physically cause a death to be death eligible, "[t]he focus must be on [the defendant's] culpability, not on that of those who committed [the murders], for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

In *Enmund*, the Supreme Court established a clear limitation on the imposition of the death penalty if the defendant did not physically cause a death, holding that the Eighth Amendment prohibits the imposition of the death penalty on a defendant "who aids and abets a felony in the course of which a murder is

committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed." *Id.* at 797. The defendant in *Enmund* was the driver of a "getaway" car for two others who robbed and murdered an elderly couple in their home. *Enmund*, 458 U.S. at 782. Based solely on this participation, the defendant was convicted of first-degree murder and sentenced to death. *Id.* at 785. On those facts, the Supreme Court reversed the death sentence. *Id.* at 797. Thus, in the case of conspiracy, the Constitution requires that the defendant's punishment be "tailored to his ***personal*** responsibility and moral guilt." *Edmund*, 458 U.S. at 801 (emphasis added). "[A]ny sentence of death cannot be predicated upon the actions of any co-conspirators, but rather only upon the actions of [the defendant] himself." *United States v. Baskerville*, 491 F. Supp. 2d 516, 519 (D.N.J. 2007); *see also Lockett*, 438 U.S. at 604-05 (finding that the Constitution requires an individualized consideration regarding whether a sentence of death should be imposed).

Moussaoui's role in the conspiracy, for which he would bear "personal culpability," simply was not sufficient to meet the Eighth Amendment's proportionality requirement. As set forth above, his lies to Samit were too attenuated and removed from the deaths on September 11th to justify death eligibility. Indeed, Moussaoui's act of failing to admit membership in al Qaeda upon interrogation *cannot* constitutionally satisfy this standard. Further, this reading of the FDPA would expand the statute to render death eligible all conspirators connected to a killing who happen to have any contact with law

enforcement. That interpretation would also expand the FDPA to deem death eligible all those who fail to admit membership in a criminal enterprise that results in a death. This sort of punishment for, in essence, group affiliation would fail the "individualized consideration" requirement espoused by the Supreme Court and, therefore, violate the Eighth Amendment.

For each of these reasons, this Court should vacate the finding of death eligibility.

C. THE DISTRICT COURT'S ERROR REQUIRES A RE-SENTENCING.

As a matter of law, Moussaoui should have been deemed ineligible for the death penalty. However, as a direct consequence of the jury's incorrect finding of death eligibility, the district court was bound, under 18 U.S.C. § 3594, by the jury's recommendation of life imprisonment. *See* JA5557; *see also* JA5566. Without that incorrect finding, the district court would have had the discretion to impose the sentence it believed was appropriate.

As set forth above, the district court also erred in concluding that Moussaoui was only eligible for life imprisonment or death. *See supra* at 171-177. The district court and the parties misconstrued the sentencing options on the capital counts as life imprisonment or death. As a result and contrary to 18 U.S.C. § 3593(e),[105] the jury considered only those two options in the sentencing phase trial.

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[105] This section provides for sentences of death, life imprisonment without possibility of release, or "some other lesser sentence." This issue is addressed at 171-177.

JA1589. In fact, none of the six offenses mandated a life sentence – with or without a finding that a death resulted from Moussaoui's lies to federal agents. Thus, in a proper re-sentencing proceeding, the district court would have two options available: life imprisonment and a term-of-years.

Therefore, if and only if this Court holds Moussaoui was not eligible for the death penalty, this Court should vacate Moussaoui's sentence and remand for the district court to decide between life imprisonment or a term of years.[106] The jury's incorrect finding in that regard affected Moussaoui's sentence, and for that reason, this Court should remand for a re-sentencing.

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[106] The district court made a number of rulings on discovery matters after *in camera* review of papers filed by the Government on an *ex parte* basis. Because neither Moussaoui nor his counsel were privy to these proceedings or the papers underlying the district court's orders, this Court should review them to ensure that Moussaoui's rights were not violated. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 n.2 (2d Cir. 1999) (conducting *in camera* appellate review of decisions made in district court); *Nix v. United States*, 572 F.2d 998, 1005 (4th Cir. 1978) (same). Review is especially appropriate here because the orders defense counsel received were ambiguous in several respects. See *supra* at 78.

CONCLUSION

For the reasons set forth above, this Court should vacate and dismiss the finding of death eligibility, vacate Moussaoui's plea, and remand for proceedings consistent with Moussaoui's constitutional rights.

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REQUEST FOR ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1), undersigned counsel respectfully request oral argument in this appeal. Among other things, this case involves complicated issues of law, and undersigned counsel believe that the decisional process of this Court would be significantly aided by oral argument.

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January 17, 2008

CERTIFICATE OF COMPLIANCE WITH PAGE LIMITS

This brief was written with Microsoft Word 2003 using Times New Roman, fourteen point font. Pursuant to this Court's Order of November 16, 2007 (Dkt. #10001), the opening brief was to be limited to 200 pages, or 50,000 words.

The brief as filed contains 202 pages, and simultaneously with the filing of this brief, undersigned counsel are filing a Consented to Motion to Filed Oversized Brief. If this Court grants that motion, this brief will comply with the type-volume limitation of Federal R. App. P. 28.1(e)(2) or 32(a)(7)(B) and this Court's orders.

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CERTIFICATE OF SERVICE

I certify that on January 17, 2008, a copy of the foregoing pleading was served on the Court Security Officer for distribution to the following counsel:

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